DOCUMENT RESUME

ED 150 672 95 EA 009 378

AUTHOR Delon, Floyd G.
TITLE Legal Controls on Teacher Conduct: Teacher Dsicipline. NOPLE Monograph Series. ERIC/CEM State-of-the-Knowledge Series, Number Thirty-five.
INSTITUTION National Organization on Legal Problems of Education, Topeka, Kans.; Oregon Univ., Eugene. ERIC Clearinghouse on Educational Management.
SPONS AGENCY National Inst. of Education (DHEW), Washington, D.C.
PUB DATE 77
CONTRACT 400-78-0007
NOTE 90p.; For a related document, see ED 069 017
AVAILABLE FROM National Organization on Legal Problems in Education, 5401 Southwest 7th Avenue, Topeka, Kansas 66606 ($4.95,prepaid)

EDRS PRICE MF-$0.83 HC-$4.67 Plus Postage.
DESCRIPTORS Contracts; *Court Litigation; Elementary Secondary Education; Job Tenure; *School Law; *State Legislation; *Teacher Behavior; Teacher Certificates; Teacher Certification; Teacher Characteristics; *Teacher Discipline; Teacher Dismissal; Teacher Qualifications; Teacher Salaries

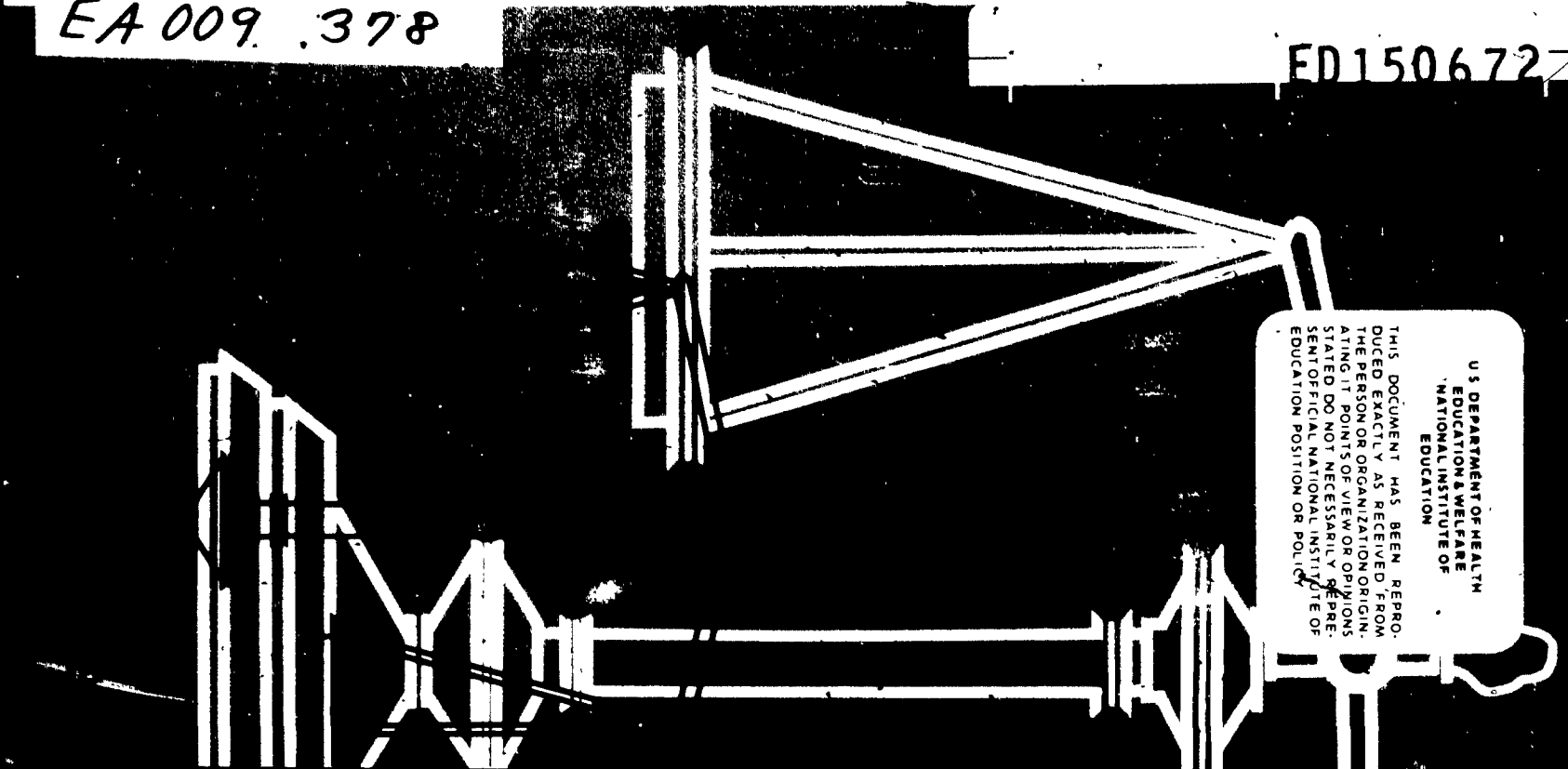
ABSTRACT

This is an expansion and revision of the author's 1972 monograph "Substantive Legal Aspects of Teacher Discipline." The major focus is again placed on the identification and description of the present legal restrictions on teacher behavior both in and out of the classroom. The author examines statutory provisions affecting certification, contracts and tenure, conflict of interest, school records and reports, pupil protection and child abuse, duties and responsibilities of teachers, and self-discipline by the teaching profession. He examines case law concerning certification denial, suspension, and revocation; contract nonrenewal and termination; teacher suspension, transfer, and demotion; and salary loss, fines, and imprisonment. The major developments over the past five years have been in the areas of state legislation and court decisions. (Author/IRT)

Legal Controls on Teacher Conduct: Teacher Discipline

Floyd G. Delon

NOLPE Monograph Series



LEGAL CONTROLS ON TEACHER CONDUCT: Teacher Discipline

(A revision and update of *Substantive Legal Aspects of Teacher Discipline*, ERIC/CEM State-of-Knowledge Series, No 23; NOLPE Second Monograph Series, No. 2)

FLOYD G. DELON

1977

Commissioned by
ERIC Clearinghouse on Educational Management
University of Oregon
Eugene, Oregon 97403

Published by
National Organization on Legal Problems of Education
5401 Southwest Seventh Avenue
Topeka, Kansas 66606

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ERIC/CEM State-of-the-Knowledge Series, Number Thirty-five
Clearinghouse Accession Number: EA 009 378

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FOREWORD

This monograph by Floyd G Delon is an expansion and revision of Dr Delon's earlier monograph, *Substantive Legal Aspects of Teacher Discipline*, published by NOLPE in 1972 The paper was prepared through a cooperative arrangement between the ERIC Clearinghouse on Educational Management and the National Organization on Legal Problems of Education (NOLPE). Under this arrangement, the Clearinghouse provided the guidelines for the organization of the paper, commissioned the author, and edited the paper for content and style. NOLPE selected the topic for the paper.

Dr Delon examines current statutory and case law to determine the present legal restrictions on teacher behavior both in and out of the classroom He concludes that major changes have taken place in the legal aspects of teacher discipline, as a result of legislation, court decisions, and developments in the total social context

Dr Delon is a professor in the College of Education of the University of Missouri at Columbia. He has taught school for three years and served as a principal for six years in the public schools of Indiana He received his bachelor's degree in 1951 from Ball State Teachers College, his master's degree in 1954 from Butler University, and his doctor's degree in 1961 from the University of Arizona.

From 1967 to 1969 Dr Delon served as senior research specialist and later as executive director of the South Central Region Educational Laboratory In the area of school law he has directed a summer institute, conducted workshops, and made numerous presentations to professional meetings Among his publications is a book coauthored with Lee O. Garber entitled *The Law and the Teacher in Missouri.*

PHILIP K PIELE, Director
ERIC Clearinghouse
on Educational Management

MARION A MCGHEHEY,
Executive Secretary
NOLPE

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LEGAL CONTROLS ON TEACHER CONDUCT:

Teacher Discipline

by
Floyd G Delon

I. INTRODUCTION

Definition and Scope

Never before in history has the American public focused so much attention on the personal conduct of public officials and employees. Watergate and related episodes, the investigations of the CIA and the FBI, and the congressional "sex" scandals have captured the attention of the most ambivalent. Consequently, morality in government has received increasing emphasis in political campaigns.

Although this general interest has encompassed teacher conduct, the public concern about teacher conduct appears to have existed since the establishment of formal education in America. This concern, resulting in part from the assumption that teacher conduct significantly influences pupil conduct, is expressed in legislation and court decisions affecting various aspects of the teacher's professional and personal life

In recent years, the employee-employer relationship in public education has continued to change rapidly. The enactment by state legislatures of teacher collective bargaining laws is substantial evidence of this change.[1] Throughout the country, more and more boards of education are entering into negotiated agreements with teachers' organizations These agreements frequently contain grievance procedures that relate directly to situations involving teacher discipline

Because of the developments that have occurred since the preparation of the first "teacher discipline" monograph five years ago, the time is appropriate to again document the "state-of-the-knowledge" in this area As in the previous volume, teacher discipline refers to the legal rules governing teacher conduct and the punishments assessed violators of these rules Primary consideration is given to the substantive rather than to the procedural aspects of this topic

The major focus is again placed on the identification and description of the present legal restrictions on teacher behavior both in and out of the classroom The discussions, based on current statutory and case law, are directed to teachers, administrators, school boards, and school board attorneys.

1 A Lawyers Committee for Civil Rights Under Law publication reported that to date twenty-nine states have collective bargaining or professional negotiations laws covering teachers *See* H BEEFERT, R HARPER & D SCHEMBER, STATE LEGISLATION AFFECTING INSERVICE STAFF DEVELOPMENT IN PUBLIC EDUCATION xxiii-xxvi (1976)

Historical Perspectives on Teacher Discipline

Because public attitudes and opinion so frequently influence teacher discipline, directly or indirectly, writings in this area provide needed background for a meaningful interpretation of the law. Also, a historical overview permits relating changes in the mores of society to developments in the law and disciplinary practice.

Since the early history of this country, the public has been far more restrictive in its expectation for the conduct of teachers than for the conduct of the average lay citizen. This situation existed even in colonial New England where religion and education were almost inseparable. According to Elsbree, the public was especially critical of teachers during the first half of the nineteenth century when it evoked the most rigid moral and religious standards.[2] In 1841 an annual report of the board of education in Boston expressed the necessity for teachers to set examples for pupils in "deportment, dress, conversation, and all personal habits."[3]

In his exhaustive study, *A History of Freedom of Teaching in American Schools*, Beale cited incidents recorded during the midnineteenth century in which teachers were reprimanded, dismissed, fined, imprisoned, and even subjected to mob harassment for real or imagined violations of prevailing public standards.[4] Such violations included teaching black children[5] and advocating abolition of slavery.[6]

By 1900, state statutes contained provisions that not only prescribed the personal attributes required for teacher certification but also, in some instances, specified what must and must not be taught. In Arkansas examiners were charged not to license "any person who is given to profanity, drunkenness, gambling, licentiousness or other demoralizing vices, or who does not believe in the existence of a Supreme Being."[7] In 1903, as a result of the temperance movement, a total of forty-seven states and territories required class instruction on the harmful effects of alcohol.[8] During the following two decades, legislators shifted their attention to forbidding the teaching of evolution. Between 1921 and 1929, thirty-seven antievolution bills were introduced into the legislatures of twenty states.[9]

In a book published in 1925, Lewis commented on the teaching profession's development of codes of ethics.[10] He observed that the purpose of these codes was widely misunderstood by the public, who viewed them as the pro-

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2 W. Elsbree, The American Teacher 296 (1939).
3 *Id* at 297
4 H. Beale, A History of Freedom of Teaching in American Schools 3-11 (1941)
5 *Id* at 131
6 *Id* at 143-156
7 Elsbree, *op cit. supra* note 2, at 355
8 Beale, *op cit supra* note 4, at 226
9 H. Beale, Are American Teachers Free? 227 (1936)
10 E. Lewis, Personnel Problems of the Teaching Staff 419 (1925)

fession's attempt to restrict admission. Lewis also wrote on the legal status of teachers, commenting that court decisions of that day were divided concerning the legality of employment contracts that provided for dismissal of teachers at the option of the board.[11]

From his 1939 study of the reported causes for teacher dismissal, Anderson concluded "that in most states teacher dismissal was on a personal rather than a professional basis."[12] The distribution of causes in the samples reviewed was as follows: incompetency and inefficiency (34), reassignment and transfer (26), insubordination (24), marriage and childbirth (25), neglect of duty (22), abolition of position (21), abandonment of position (18), immorality and rumors of immorality (17), general unpopularity (8), unprofessional conduct (7), anticipated causes (6), and political activity (4).[13] Among the trends cited by the author were the following:

1. The courts' tendency to affirm dismissals of women for marriage
2. The courts' invalidation of dismissals for "anticipated" causes.
3. The courts' consistent pattern of upholding dismissals for "immorality."
4. The school boards' use of the charge of "abandonment of position" when the teacher was actually available and willing to continue service.
5. The school boards' frequent reliance on "abolition of position" as a basis for teacher dismissal in districts operating under tenure laws.[14]

In conclusion, Anderson stated that "court decisions showed little evidence on the part of the teaching profession to set its own house in order."[15]

Elsbree hypothesized that the beginnings of a more liberal attitude toward teacher conduct accompanied a relaxation of moral standards by society in general during World War I.[16] However, Anderson's study of teacher dismissal provided little evidence of an immediate turn to permissiveness with respect to teacher behavior. In fact, Beale found rural communities still quite restrictive through the 1930s;[17] many teachers had very little freedom in their personal lives until the enactment of statewide tenure laws.

By 1950, community pressures had gradually decreased. Calloway reported that 75 percent of Missouri teachers who responded to a survey felt no pressure against dancing, smoking, or card playing. Yet 58 percent responded that social drinking was "frowned on" by the community or the administration, and 20 percent said they found opposition to their participa-

11. *Id* at 440
12. Anderson, Trends in Causes of Teacher Dismissal as Shown by American Court Decisions 9 (1939) (Abstract-Ed D Diss., George Peabody College of Teachers)
13. *Id* at 5-6
14. *Id* at 9
15. *Id* at 8
16. ELSBREE, *op cit supra* note 2, at 535
17. BEALE, *op cit supra* note 9, at 374-375

tion in activities open to other citizens.[18] Story, in analyzing the results of a survey of 950 classroom teachers, concluded the evidence "seems to point to a growing change in public attitude toward teachers."[19]

Bolmeier observed in 1960 that teachers were "more restricted than most citizens in the exercise of their freedoms guaranteed by the Constitution."[20] This conclusion was based on a review of court decisions on teacher involvement in subversive, political, union, and other controversial out-of-class activities.

On the other hand, Firth, advocating self-discipline by the teaching profession, declared, "Existing legal machinery is apparently inadequate for the removal of incompetent or unethical teachers from our classrooms."[21] In this same vein, Garber expressed doubt that a teacher could be fired for "unprofessional conduct" because of his public criticism of the school system, unless such criticism can be shown to impair or disrupt discipline or the teaching process.[22] Similarly, Garber concluded in 1968 that "the right of a school board to control the dress or appearance of the teacher is limited to occasions where the matter it desires to control has an adverse effect on students and or learning conditions of the school."[23]

A number of articles on teacher immorality were published in the late 1960s. Punke wrote, "The moral code for teachers is more rigid than for people in many vocations."[24] Through an analysis of court decisions, Koenig identified the various meanings ascribed to teacher "immorality" and "misconduct." He closed the discussion with the following recommendation:

> For the teacher who would avoid dismissal on the grounds of immorality or misconduct . . . guidelines would include the avoidance of illicit sexual activity, the avoidance of actions which might cast doubt on either character or reputation, a thorough knowledge of the community in which service is being performed; and a readiness to forfeit a certain degree of personal independence and freedom of action.[25]

According to Nolte, the board of education "may legally expect the teacher

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18 Calloway, *Are Teachers Under Community Pressure?* 37 SCHOOL AND COMMUNITY 458 (1951)

19 Story, *Public Attitude Is Changing Toward Teacher's Personal Freedom*, 45 NATION'S SCHOOLS 70 (1950)

20 Bolmeier, *Legal Scope of Teachers Freedoms*, 24 EDUCATIONAL FORUM 199-206 (1960).

21 Firth, *Teachers Must Discipline Their Professional Colleagues*, 42 PHI DELTA KAPPAN 24 (1960)

22 Garber, *Can You Fire a Teacher for Unprofessional Conduct?* 73 NATION'S SCHOOLS 90 (1964)

23 Garber, *To Shave or Not to Shave That Is the Requirement*, 82 NATION'S SCHOOLS 50 (1968)

24 Punke, *Immorality as Ground for Teacher Dismissal*, 49 NASSP Bull 53 (1965)

25 Koenig, *Teacher-Immorality and Misconduct*, 155 AMERICAN SCHOOL BOARD J 19 (1968)

teen years states have adopted legislation referred to as "professional practices" laws, which delegate certain disciplinary authority to the profession. In 1965, the National Education Association (NEA) developed and published a set of guidelines for such legislation.[120]

Kentucky and Florida were among the first states to enact professional practices legislation. The content of the Florida act, as expressed in its title, is typical of statutes adopted subsequently:

> An act declaring teaching a profession, with all the rights, responsibilities and privileges: creating a professional teaching practices commission; authorizing appointment of members and adoption of a code of ethics and professional performance; providing for adoption of regulations approved by the state board of education; providing for authority to make recommendations involving suspension and revocation of certificates; providing effective date.[121]

The American Association of Colleges for Teacher Education (AACTE), in 1972, reporting the status of professional practices legislation in the various states, indicated eighteen states had practices commissions, standards boards, or combinations of both.[122] A May 1976 report of the National

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93. ARIZ. REV. STAT. § 15-207 (1975).
94. ARK. STAT. ANN. 80-1213 (Supp 1969)
95. *Id.* 80-1616 (1960 Repl.)
96. *Id.*
97. DEL. CODE ANN 14, § 1325 (1974).
98. GA. CODE ANN 32-9907 (1975)
99. HAWAII REV STAT § 297-4 (Supp. 1975)
100. KANS. STAT. ANN. 21-306 (1974).
101. WEST'S LA STAT. ANN 14:417 (1975)
102. *Id.* 17:1203.
103. MASS G.L.A 71 § 30A (Supp. 1975).
104. *Id.* 71 § 33.
105. MINN STAT ANN § 127-17 (Supp. 1975)
106. MISS. CODE § 37-9-63 (1972).
107. REV. STAT. OF NEBR. 79-1274 (1968).
108. MCKINNEY'S CONS. LAWS OF N Y. ANN. § 805 (Supp. 1975)
109. PAGE'S OHIO CODE ANN. § 3313 99 (1960)
110. PURDON'S PA STAT. ANN 24 § 11-1112 (1962)
111. TENN CODE ANN. 49-1408 (1966 Repl.)
112. VERNON'S TEX CODE ANN. 4.13 (1972)
113. *Id.* 4.16.
114. *Id.* 4.15.
115. VT. STAT ANN. 16 § 1481 (1975 Repl.)
116. CODE OF VA. § 222-215 (1973 Repl.)
117. REV. CODE OF WASH. 9.05.020 (1970).
118. WIS. STAT. ANN 118 16 (1973).
119. WYO STAT. § 21.1-180 (1957).
120. *See*, JOINT COMMITTEE ON PROFESSIONAL PRACTICE REGULATIONS OF THE NATIONAL COMMISSION ON TEACHER EDUCATION AND PROFESSIONAL STANDARDS AND THE COMMISSION ON PROFESSIONAL RIGHTS AND RESPONSIBILITIES, PROFESSIONAL PRACTICES REGULATIONS (1965).
121. LAWS OF FLA. 63-363 (1963)
122. AACTE ALERT 1, at 4 (1972).

tional problems.[35] The members of the group had extensive records of arrest for such violations as drunken driving, disturbing the peace, indecent exposure, lewd conduct, theft, and possession of dangerous drugs. One applicant for a credential to teach public safety and accident prevention was arrested nine times for speeding, failure to stop at a crosswalk, having no vehicle lights, making a U-turn in the middle of the block, and leaving the scene of an accident.

During the 1970s, several writers dealt with the topic of the legal status of academic freedom in the schools. Nolte wrote:

> Although there seems to be an inclination on the part of the courts to broaden the protected area of academic freedom in the classroom, this territory is still ill-defined and subject to further litigation. . . .[36]

Knutson completed a doctoral dissertation in which he traced the historical development of academic freedom and analyzed the effect of state constitutional provisions on freedom to teach.[37] He formulated guidelines for teachers and submitted them for validation to a panel composed primarily of school attorneys. In another dissertation study, Bartman sought to identify and describe the legal parameters within which policy-making relative to academic freedom may take place.[38] This study indicated that the courts referred to academic freedom as "encompassing a teacher's unofficial acts, a teacher's utterances, and a teacher's teaching freedom" within its scope, and that the protections for academic freedom in any of the categories are not absolute but must be balanced against other state interests. More recently, McKeown suggested that academic freedom might have to yield to the public (and governmental) pressure for accountability:

> Educators may discover that teachers are employed primarily as experts to translate administratively designated district and school objectives into effective classroom programs and experiences. They may also discover that teachers who decide not to teach the district required writing skills or social science inquiry strategies because "there are better things to do," and administrators who allow them to avoid their responsibilities are both links the public school systems can ill afford.[39]

A number of recent publications focused on the teacher's legal rights in general. Fischer and Schimmel authored a book that discussed teachers'

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35 Bower & Greenfield, *Disturbed Teachers Whose Credentials Were Revoked*, 10 PSYCHOLOGY IN THE SCHOOLS 54-60 (1973)

36 Nolte, *From Scopes to Epperson and Beyond; Academic Freedom in the Schools*, 3 NOLPE SCHOOL LAW JOURNAL 47 (1973). For a review of higher education cases, *see* Grace, *Academic Freedom versus Student Rights*, 5 NOLPE SCHOOL LAW J. 110 (1975).

37 Knutson, Academic Freedom. the Teacher in the Public School Classroom. (1974) (Unpublished Ed D. Diss., University of Denver).

38. Bartman, The Legal Status of Academic Freedom in the Public Schools (1975) Unpublished Ed D. Diss., University of Missouri-Columbia).

39. McKeown, *The Fallacies of Academic Freedom and Professional Rights*, 60 NASSP. BULL. 61 (1976)

rights associated with speech, private life, personal appearance, loyalty oaths, organization memberships, and political activity [40] A 1973 article contained the following observation:

> Even today, teacher behavior unrelated to professional matters has been the focus of school boards attention [41]

The author went on to point out that the boards fire or change the status of many of these teachers on the ground that their behavior constituted "conduct unbecoming a teacher" or "unprofessional conduct." Walden, however, maintained that "a teacher's private behavior, so long as it remains private, is not subject to an employer's scrutiny "[42] In fact, Davis cited what he termed "a perceptible shift in judicial direction," and he concluded that in dismissing a teacher, a school board is now required to relate a teacher's misbehavior to his job performance or to the effect that misbehavior has on the education process or system [43] Citing specific examples of teacher misconduct, Hudgins warned school boards against dismissing teachers without establishing this necessary connection [44] Similarly, in 1975 Ostrander contended that "teachers whose nonconventional behaviors are practiced with discretion . are likely to meet with the protection of the courts."[45] Actually, these observations do not deviate markedly from that expressed by Stinnett in 1968 that today's teachers "can do just about anything that any respectable citizen can do "[46]

Finally, the wide public interest in teacher conduct is still very much in evidence. Recently an article appeared in the *Wall Street Journal*, titled "More Teachers Fight Efforts to Fire Them for Personal Conduct,"[47] and another in *Newsweek* under the byline "Private Lives "[48]

II. STATUTORY PROVISIONS

The statutes of each of the fifty states contain provisions regulating certain aspects of teacher behavior The implied and sometimes expressed legislative intent of such laws is to protect the children and youth enrolled in the public schools and to safeguard the public funds allocated for the support of these schools Most of these statutes enumerate and/or define the undesirable conduct and specify the penalties to be assessed Of course, some of the legislation still in effect is a product of the public attitudes of the past; such provisions are rarely, if ever, enforced

40 FISCHER & SCHIMMEL, THE CIVIL RIGHTS OF TEACHERS (1973)

41 Sinowitz, *Teacher's Right to Privacy*, 62 TODAY'S EDUCATION 89 (1973)

42 Walden, *A Right to Privacy*, 53 THE NATIONAL ELEMENTARY PRINCIPAL 99 (1974) *See also*, *Insubordination*, 54 THE NATIONAL ELEMENTARY PRINCIPAL 72-74 (1975)

43 Davis, *Teacher Dismissal on Grounds of Immorality*, 46 CLEARING HOUSE 422 (1972)

44 Hudgins, *The Law and Teacher Dismissals*, 93 NATION'S SCHOOLS 40 (1974)

45 Ostrander, *The Teacher's Duty to Privacy Court Rulings in Sexual Deviancy Cases*, 57 PHI DELTA KAPPAN 20 (1975)

46 STINNETT, PROFESSIONAL PROBLEMS OF TEACHERS 242 (1968)

47 The Wall Street Journal, January 28, 1975, at 1, col 1

48 *Private Lives*, NEWSWEEK, February 24, 1975, at 87

Certification

State statutes generally require that teaching certificates be issued only to applicants of "good moral character." The teacher certification statutes of most states also provide for revocation and suspension of certificates by the issuing authority. The usual meaning attributed to revocation and suspension is, respectively, invalidation and temporary invalidation. However, the words are used interchangeably in the statutes of some states, and in others revocation refers to both an indefinite and a term cancellation of the certificate. Regardless of the definition, revocation is a severe form of disciplinary action since the involved individual ceases to be recognized as a teacher.

Although the terminology and specific provisions differ slightly from state to state, Alabama laws contain a typical example of a revocation statute:

> The state superintendent of education shall have the authority to revoke any certificate issued under the provisions of this chapter when the holder has been guilty of immoral conduct or indecent behavior.[49]

Alaska law includes definitions of the enumerated causes of revocation, for example, "immorality, which is defined as the commission of an act which, under the laws of the state constitutes a crime involving moral turpitude."[50] Many state statutes do not contain specific definitions of the offending behaviors, requiring those who administer the laws to exercise considerable discretionary authority in implementing them. Frequently the courts must make the final determination whether or not a given act of a teacher corresponds to a stated ground for revocation.

Table 1 presents a tabulation of the statutory grounds for the revocation or suspension of teaching certificates in each of the fifty states. These data, representing a wide range of in-and out-of-class behaviors, fall into twenty-six categories. The most frequently stated cause is "immorality" (31 states), followed by "incompetency" (24 states), "contract violation" (22 states), and "neglect of duty" (21 states). Each of these four categories had a net increase in total during the past five years because of new legislation. Although obvious overlap exists among these classifications, further classification into more discrete categories does not appear warranted.

This listing suggests the legislative intent to protect students and to safeguard public funds. Such grounds for revocation as "immorality" and "reprehensible conduct" are apparently intended to protect pupils from an unacceptable example or actual harm by a teacher, whereas the grounds of "incompetency" and "neglect of duty" are to protect pupils from inferior instruction. The purpose of the legislation against "failure to keep records" and "falsification of records" (for example, attendance and transportation

49. CODE OF ALA. tit 52, § 337 (1927)
50 ALASKA STAT § 14 20 030 (1975)

records) relates to safeguarding public funds from misappropriation.[51] The Arkansas statute requiring revocation of the certificate of any teacher who "fails to repay unearned salary on a contract breached by him" is for this same purpose.[52]

The term "cause" with its qualifying adjectives is used in two distinctively different ways in the statutes. The more common usage is at the end of a series of grounds; for example, in Illinois any certificate "may be suspended by the Superintendent of Public Instruction for one year upon evidence of immorality, incompetency, unprofessional conduct . . . *or other just causes*" (emphasis added).[53] Such language tends to broaden the discretionary authority of the administering agency. In a few instances the term is used merely to introduce the series of grounds, as in the Nebraska statute: "The State Board may revoke or suspend the certificate for *just cause. Just cause* may consist of incompetence, immorality, intemperance" (emphasis added).[54]

Another provision that merits special attention suggests a more up-to-date position on teacher discipline. The revocation of certificates for violations of the teaching profession's adopted code of ethics represents a legislated effort to foster self-discipline among teachers.[55] The state of Oregon has shifted the authority to revoke certificates to a Professional Practices Commission.[56] The Delaware statute, which ties the revocation of the certificate to dismissal for the stated grounds, provides a reasonable approach to the more efficient and equitable administration of teacher discipline.[57] The similarity of the grounds for teacher dismissal and for certificate revocation is readily discernible when the statutes are compared.

Disciplinary provisions in addition to revocation are included in the certification statutes of some states. A twenty-five dollar fine is assessed any person convicted of teaching without a certificate in the public schools of Hawaii.[58] In Tennessee, the alteration of a teaching certificate is a misdemeanor punishable by a fine as well as by the revocation of that certificate.[59]

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51. *See e.g.* ARK. STAT ANN. 80-1509 (1960); NEV. R.S. 391-340 (1956); and FLA. STAT. ANN. 232-021 (Supp. 1975); GA. CODE ANN 32-1020; MISS. CODE § 37-9-73; N.H. REV. STAT. ANN. 189.42 (supp. 1973); GEN. STAT. OF N.C. § 115-66 (Supp 1975); VT. STAT. ANN. 16 § 1481 (1975 Repl.); W. VA. CODE 15A-4-9 (1971 Repl.); WIS. STAT. ANN. 118.166 (1973).
52. ARK. STAT. ANN. 80-1331 (1960).
53. ILL. ANN. STAT. 122 § 21-23 (Supp. 1975).
54. NEB. R.R.S. 79-1234 (1971).
55. TENN. CODE ANN 49-1401 (Supp. 1975).
56. ORE. LAWS OF 1973 at 537 (amending 342.865)
57. DEL. CODE ANN. 14 § 1204 (1974).
58. HAWAII REV. STAT. § 297[illegible] (Supp. 1975).
59. TENN. CODE ANN. 49-123[illegible] (1966).

TABLE 1

STATUTORY GROUNDS FOR REVOCATION OR SUSPENSION OF TEACHING CERTIFICATES

	Incompetency	Unfitness for Service	Negligence, Neglect of Duty	Failure to Keep Required Record	Failure to Provide Designated Instruction	Inefficiency	Insubordination	Refusal to Obey School Board Regulations	Noncompliance with School Laws	Disloyalty, Subversive Activity	Failure to acquire U.S. Citizenship, Take Oath	Contract Violations, Cancellation, Annulment, Breach	Conviction of Specified Crimes	Immorality	Indecent Behavior, Reprehensible Conduct, Unnatural or Lascivious Acts	Untruthfulness, Dishonesty, Falsification of Application, Records	Drunkenness, Intemperance	Addiction to Drugs and/or Selling Drugs	Cruelty	Conduct Unbecoming a Teacher	Unprofessional Conduct, Misconduct in Office	Violation of Code of Ethics	Causes Preventing Initial Issuance of Certificate	Cause (Good, Just, Sufficient)	Certificate Revoked in Another State	Failure to Obey State Laws	Failure to Attend Required Institutes
Alabama												X	X		X					X						
Alaska		X							X				X													
Arizona									X			X									X					
Arkansas												X				X										
California												X	X	X		X		X			X					
Colorado		X		X				X				X		X		X										
Connecticut													X			X								X		
Delaware		X		X						X				X												
Florida		X							X				X	X		X								X		
Georgia		X		X																				X		
Hawaii														X					X							
Idaho		X		X								X	X			X						X				
Illinois		X		X	X									X							X			X		
Indiana		X		X										X							X					
Iowa		X		X										X			X		X		X					
Kansas				X								X		X								X				
Kentucky		X		X										X							X					
Louisiana																										
Maine																								X		
Maryland																										
Massachusetts									X																	
Michigan												X				X						X				
Minnesota				X			X					X		X		X						X				
Mississippi												X				X										
Missouri		X		X								X		X			X		X							
Montana		X										X	X	X			X					X				
Nebraska		X		X								X	X	X			X		X		X			X		
Nevada		X	X					X		X		X		X		X				X	X				X	X
New Hampshire																										
New Jersey				X							X										X	X				
New Mexico		X												X												
New York					X		X					X		X										X		
North Carolina																										
North Dakota		X		X								X	X	X			X		X			X				X
Ohio		X		X										X			X			X						
Oklahoma		X		X						X		X		X					X							
Oregon			X	X								X	X			X										
Pennsylvania		X		X									X	X			X		X							
Rhode Island																								X		
South Carolina		X	X	X					X			X	X	X		X		X			X			X		
South Dakota		X		X						X		X		X								X				
Tennessee														X		X										
Texas			X									X									X	X				
Utah														X							X			X		
Vermont																										
Virginia																										
Washington												X	X	X			X				X					
West Virginia														X		X	X							X		
Wisconsin														X												
Wyoming		X		X										X	X											

Contracts and Tenure

The statutes considered in this section encompass the legal grounds for dismissing a teacher, that is, terminating or not renewing the teacher's employment contract. These provisions are predominantly a part of tenure legislation and apply largely to permanent teachers. The Wisconsin statute is a characteristic example:

> No teacher who has become permanently employed shall be refused employment, dismissed, removed, or discharged except for inefficiency and immorality, willful and persistent violation of reasonable regulations . . . or for other good and just cause.[60]

The statutes of some states, however, make the grounds applicable to all teachers. In Wyoming, the board of education "may suspend or dismiss any teacher for incompetency, neglect of duty, immorality, insubordination or any other good and just cause."[61]

There are approximately twenty-five stated legal causes or grounds for the dismissal or suspension of teachers. Again, the data for the fifty states are presented in table form. Table 2 shows that the most frequently listed grounds are "immorality" (34 states), "incompetency" (31 states), "neglect of duty" (28 states), "insubordination" (22 states), and "inefficiency" (18 states). In twenty-six states, school boards are empowered to fire teachers for "cause." Again, each of these totals increased during the past five years.

Many of the comments of the preceding section could appropriately be repeated here. Here also, there is overlap between categories of grounds listed in the table, for example, "insubordination" and "refusal to obey school board regulations." However, Kansas, Massachusetts, and Tennessee laws do list these as separate grounds. Maine added a new dimension to "just cause" for dismissal or nonretention by making it a negotiable item.[62]

The category labeled "other" includes provisions appearing in the statutes of a single state. For example, in California, each city (or city and county) board of examiners may remove a teacher for "profanity."[63] Also, under the statutes of Louisiana, a teacher may be suspended for teaching "any course designated as sex education or any other course . . . dealing primarily with the human reproductive system as it pertains to the act of sexual intercourse." This penalty further applies to any instructor who "shall test, quiz,

60. W.S.A. § 118.23 (Supp. 1975).
61. Wyo. Stat. § 21.1-15 (Supp. 1975).
62. Maine Legislative Service 1976 at 151 M.R.S.A. 20 § 161.
63. Ann. Cal. Codes § 13216 (1975).

TABLE 2

STATUTORY GROUNDS FOR THE DISMISSAL OR SUSPENSION OF TEACHERS

	Incompetency	Unfitness for Service	Negligence, Neglect of Duty	Failure to Provide Designated Instruction	Failure to Attend Required Institutes	Inefficiency	Incapacity	Insubordination	Refusal to Obey School Board Regulations	Noncompliance with School Laws	Disloyalty, Subversive Activity	Contract Violation, Cancellation, Annulment, Breach	Conviction of Specified Crime	Immorality	Untruthfulness, Dishonesty, Falsification of Application, Records	Drunkenness, Intemperance	Addiction to Drugs and/or Selling Drugs	Cruelty	Conduct Unbecoming a Teacher, Misconduct in Office	Unprofessional Conduct	Violation of Code of Ethics	Revocation of Certificate	Cause (Good, Just, Sufficient)	Failure to Obey State Laws	Other
Alabama	X		X			X			X					X									X		
Alaska	X										X		X	X							X				
Arizona																									X
Arkansas													X												
California	X	X							X	X		X		X	X		X		X			X		X	X
Colorado	X		X		X				X				X	X	X							X			
Connecticut	X					X			X						X							X			
Delaware	X		X						X						X										
Florida	X		X						X					X	X		X	X		X					
Georgia	X								X													X			X
Hawaii						X			X						X							X			
Idaho									X											X					X
Illinois	X		X												X			X				X			
Indiana	X		X						X			X			X							X			
Iowa	X		X																			X			
Kansas																						X			
Kentucky	X		X			X			X						X					X					
Louisiana	X		X														X								X
Maine																						X			
Maryland	X		X						X						X					X					
Massachusetts						X	X	X	X			X			X					X			X		
Michigan									X								X						X		
Minnesota			X			X		X		X			X	X	X					X			X		
Mississippi	X		X										X		X		X		X			X			
Missouri	X		X			X		X	X	X				X	X										X
Montana	X	X				X			X						X										X
Nebraska	X		X							X															X
Nevada		X	X			X		X				X		X	X						X	X			
New Hampshire	X														X		X			X					
New Jersey						X	X															X			X
New Mexico																						X			
New York	X		X			X		X							X					X			X		
North Carolina	X		X			X	X		X			X		X	X			X				X			
North Dakota						X	X		X				X	X	X					X			X		
Ohio						X			X						X								X		
Oklahoma	X		X									X			X			X							
Oregon			X			X		X	X				X	X								X			X
Pennsylvania	X		X									X			X			X	X						X
Rhode Island									X														X		
South Carolina	X		X						X						X	X		X					X		
South Dakota	X		X						X			X		X	X	X						X			
Tennessee	X		X		X	X		X	X			X		X	X			X	X	X		X			
Texas			X						X			X		X	X			X							
Utah																									
Vermont	X		X						X				X						X				X		
Virginia	X		X			X		X	X						X								X		
Washington																									
West Virginia	X		X						X				X		X			X	X	X			X		
Wisconsin						X			X						X								X		
Wyoming	X		X	X					X						X								X		

or survey students about their personal or family beliefs or practices in sex, morality or religion." Finally, another section of the Louisiana code provides that a teacher who becomes a member of his employing board forfeits his teaching position.[64]

There have been other new developments in the area of contracts and tenure. Arizona, Massachusetts, and Nevada enacted provisions for the suspension of teachers pending dismissal proceedings.[65] Texas law now lists the specific grounds on which nonrenewal actions are to be based,[66] and other states have revised listings of grounds for dismissal.[67] Finally, Maryland provides immunity for administrators in the discharge of their duties in connection with the suspension and dismissal of teachers.

Conflict of Interest

Since school operation involves the expenditure of substantial sums of money, state laws have been enacted to prevent school personnel from using their positions to generate undeserved profits. These conflict-of-interest laws, applicable specifically to teachers, provide penalties for fines and/or imprisonment for their violation. The coverage of the New Mexico statute is representative of this type of legislation:

> [The teacher] may not receive any commission or profit from sale of . . . instructional materials, furniture, equipment, books, insurance, school supplies or work under contract from the school district with which he is associated.[68]

Florida law forbids any "private fee, gratuity, donation or compensation . . . for promoting the sale of any textbook [etc.]" under penalty of a fine not to exceed one hundred dollars or imprisonment not to exceed thirty days.[69] A similar law was repealed by the Virginia General Assembly with the enactment of a general conflict-of-interest law applicable to all public employees.[70]

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64. West's La Stat Ann 17.28 (1975)
65. Ariz R S. § 15-254 (1975), M G L.A 71 § 42D (Supp 1975), 391 3l4 Nev Stat, of 1971 at 380
66. Vern Tex Code Ann 13 110 (1972)
67. *See e.g.* Colo. R S 22-63-116 (1973), Ore Laws of 1973 amending 342 865, Minn S A 125.09 (Supp. 1975)
68. N.M Stat. Ann 77-19-1 (Supp 1975).
69. Fla Stat Ann § 233 45 (1969)
70. *See,* Code of Va. 22 § 213 (Supp 1975)

Another type of provision that is related closely enough to be described in this section prohibits bribery and "kickback" in connection with teacher employment. It is unlawful for a teacher in Missouri "to contribute any portion of his salary to his school board or any member thereof" for the purposes of paying tuition or any other expenses of the operation of schools.[71] The violation of this law is considered a misdemeanor punishable by a fine not to exceed one thousand dollars, or by imprisonment for not more than one year, or both. A Kentucky law includes, but is not restricted to, teachers:

> No person shall use or promise to use directly or indirectly any official authority or influence whether possessed or anticipated to secure or attempt to secure for any person an appointment or advantage in appointment to a position as teacher or employee of a district board of education, or an increase in pay or other advantage in employment. . . .[72]

The penalty for violation is imprisonment for thirty days to six months and ineligibility for employment for a period of five years.[73]

School Records and Reports

Since allocations of state funds to the public schools are commonly based on average daily attendance, pupils transported, and so forth, legislators are understandably concerned about the completeness and accuracy of the records and reports submitted by the local school districts. As previously indicated, "failure to submit records" and "falsification of records" are legal grounds for the revocation of certificates or the dismissal of teachers in certain states.[74] Lesser penalties, such as fines and salary deductions, are assessed in other states. In a few instances, the statutes provide for imprisonment.

Dating back to the time when many states maintained several small schools under the supervision of a county superintendent, the statutes of several states still require that the final payment of the teacher's salary be withheld until the registers are submitted.[75] For example, the Arkansas law states, in part:

> Final month's pay shall be withheld until registers and reports are returned to the county supervisor. . . .[76]

New Jersey law, similarly worded, expressly requires each teacher to keep a register.[77]

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71. R S. Mo. 1969 § 168.151
72. Ky Rev Stat 161.154 (1974)
73. *Id.*
74. *See* Table 1 *supra.*
75. *See* text at *supra* note 51
76. Ark. Stat Ann 80-1213 (Supp. 1975)
77. N.J Stat. Ann 18A· 25-4 (Supp 1975).

Five states designate fines and/or imprisonment as the penalties for failure to keep records. The penalty in Wisconsin is a maximum fine of twenty-five dollars, and in Louisiana it is a maximum fine of ten dollars or ten days in jail, or both.[78] In North Carolina it is a misdemeanor not to make the required reports or to make false reports or records, and the offending teacher is subject to a fine or imprisonment at the discretion of the court.[79] Mississippi law contains comparatively severe penalties for preparing fraudulent transportation records; in addition to the forfeiture of the teaching certificate, the courts are empowered to impose a jail sentence of up to sixty days, levy a fine of not less than one hundred dollars or more than three hundred dollars, and require the repayment of all illegally expended funds.[80]

The Washington statute is unique in that it refers exclusively to the transfer of records, books, and papers from a school employee to his successor. Failure to perform this duty is punishable by a maximum fine of one hundred dollars.[81]

Finally, defrauding the teacher retirement system is a misdemeanor in Nebraska and a felony in Oklahoma.[82]

Pupil Protection and Child Abuse

Laws have been enacted specifically to protect pupils from unethical and brutal teachers. An example is the Montana statute that declares:

> Any teacher who shall mistreat or abuse any pupil by administering undue or severe punishment shall be deemed guilty of a misdemeanor and upon . . . conviction shall be fined not more than one hundred dollars. . . .[83]

The Washington statute is nearly identical except that it specifies "unreasonable punishment on the head of the pupil."[84] The New Jersey code forbids corporal punishment in any form.

It is a misdemeanor in Oklahoma "for any teacher to reveal any information concerning a child obtained by him in his capacity as a teacher."[85]

Arizona and Mississippi have laws focusing specifically on the moral transgressions of male teachers. For example, Arizona's law states:

> A superintendent, tutor or teacher in a private or public school, or instructor in music or any branch of learning, who has sexual intercourse at anytime or place with any female not his wife with her consent, while under his instruction or during his engagement as a

78 Wisc. Stat. Ann 118 18 (1973). and West's La Stat Ann 17:232 (1975)
79 Gen Stat of N C § 115-148 (Supp 1975).
80. Miss. Code § 37-41-25 (1972)
81. Rev Code of Wash Ann 28A 87 130 (1970)
82. Rev. Stat. of Nebr. 79-1553 (1971); and Okla. Stat Ann. 70 § 17-110.(1966).
83. Rev. Code of Mont. 75-6109 (Supp. 1975).
84. Rev. Code of Wash Ann. 28A 87.140 (1970)
85. Okla. Stat Ann § 6-115 (1972).

superintendent, tu[illegible] teacher shall be punished by imprisonment in the state prison [illegible]ot less than one nor more than ten years.[86]

The penalty is somewhat less severe in Mississippi. Both participants are subject to a fine of not more than five hundred dollars, and the teacher is required to serve a prison term of three to six months.[87]

Efforts to cope with the apparent increase in incidences of child abuse has resulted in new legislation at both the federal and state levels. A common provision of these statutes is a reporting requirement applicable to teachers. Willful failure to exercise this responsibility sometimes carries a penalty. For example, such violation in Nebraska is punishable by a fine not to exceed one hundred dollars.[88]

Duties and Responsibilities of Teachers

The statutes impose various special duties and responsibilities on teachers, as well as certain prohibitions in the performance of their regular duties and responsibilities. For ease of reference, the various offenses and penalties specified by these provisions are listed in Table 3.

Sections of collective bargaining laws pertaining to teachers' duties and responsibilities are not included in the table. By 1974, thirty-four states had enacted compulsory collective bargaining laws affecting the public sector. (Approximately twenty-nine of these laws were applicable to teachers.) All but seven of the existing laws prohibit strikes,[89] and most of these designate penalties such as fines or loss of wages against the offending organization, their officers, and/or striking members.

In addition to prohibiting striking, picketing, and boycotting, the Montana statute contains other provisions classified as unfair labor practices.[90] The teachers are required to bargain in good faith and are forbidden to restrain or coerce other teachers in connection with their decision to join or not to join the employee organization. Violation of either of these provisions results in the forfeiture of pay for each day of the offense.[91]

Self-Discipline by the Teaching Profession

The self-disciplining or self-policing of its membership is widely accepted as a characteristic function of a profession. Although the desirability of the teaching profession assuming this responsibility has long been recognized, little progress in this direction occurred prior to 1960.[92] During the past fif-

86. ARIZ REV. STAT § 13-615 (1975)
87. MISS CODE ANN § 97-29-3 (1972).
88. REV STAT OF NEBR. 28-150 (Supp. 1974).
89. THE PUBLIC SECTOR RESEARCH COUNCIL, PUBLIC SECTOR BARGAINING AND STRIKES at 1 (1976).
90. REV CODE OF MONT. 75-6120 (2d Repl. 1971).
91. *Id.* 75-6126
92. Darland, *The Profession's Quest for Responsibility and Accountability*, 52 PHI DELTA KAPPAN 41 (1970)

TABLE 3

STATUTORY PROVISIONS FOR TEACHER DISCIPLINE IN CONNECTION WITH LEGISLATIVELY ASSIGNED DUTIES, RESPONSIBILITIES, AND PROHIBITIONS

State	Offense	Penalty
Arizona	Failure to take course and pass examination on federal and state constitutions[93]	Dismissal
Arkansas	Failure to have physical examination[94]	Fine (not less than $25 or more than $100)
	Failure to display flag[95]	Fine (not less than $100 or more than $500) Imprisonment (not less than 30 days or more than 6 months)
	Failure to provide required instruction in American History[96]	Same as above
Delaware	Failure to return to service after leave[97]	Forfeiture of salary increments and pension credits during period of leave
Georgia	Failure to take loyalty oath[98]	Dismissal
Hawaii	Teaching without a certificate[99]	Fine (not more than $25)
Kansas	Teaching the overthrow of the government by force[100]	Fine (not more than $10,000) or imprisonment (not more than 10 years)
Louisiana	Failure to enforce school course of study and regulations[101]	Salary withheld pending compliance
	Tardiness[102]	Pay deductions based on proportions of school day
Massachusetts	Failure to take oath to support federal and state constitutions[103]	Fine (not to exceed $1,000)
	Violation of vivisection and dissection regulations[104]	Fine (not less than $10 or more than $50)
Minnesota	Failure to perform duties required by compulsory attendance law[105]	Fine ($10) or imprisonment (10 days)
Mississippi	Failure to file affidavit on organizational membership[106]	Contract voided
Nebraska	Wearing religious garb while teaching[107]	Fine ($100) or imprisonment (10 days)
New York	Failure to instruct on effect of alcoholic drinks[108]	Revocation of certificate
Ohio	Refusal to display flag[109]	Fine (Not less than $5 or more than $25 and not less than $25 or more than $100 for subsequent offense)
Pennsylvania	Wearing religious garb[110]	Suspension
Tennessee	Failure to give required notice of resignation[111]	Forfeiture of tenure status
Texas	Failure to use adopted textbook[112]	Fine ($5-$50 each offense)
	Failure to teach patriotism[113]	Fine (not to exceed $500) and removal from office
	Failure to teach Texas history[114]	Fine ($25-$200)
Vermont	Failure to hold fire drills[115]	Fine (not more than $20)
Virginia	By malfeasance, misfeasance, or nonfeasance offend school laws[116]	Fine (not less than $5 or more than $50) if no other specific penalty is provided
Washington	Teaching criminal anarchy[117]	Fine ($5,000) or imprisonment (10 years) or both
Wisconsin	Failure to enforce compulsory attendance laws[118]	Fine (not less than $5 or more than $20)
Wyoming	Failure to provide instruction in state and federal constitutions[119]	Dismissal

teen years states have adopted legislation referred to as "professional practices" laws, which delegate certain disciplinary authority to the profession. In 1965, the National Education Association (NEA) developed and published a set of guidelines for such legislation.[120]

Kentucky and Florida were among the first states to enact professional practices legislation. The content of the Florida act, as expressed in its title, is typical of statutes adopted subsequently:

> An act declaring teaching a profession, with all the rights, responsibilities and privileges: creating a professional teaching practices commission; authorizing appointment of members and adoption of a code of ethics and professional performance; providing for adoption of regulations approved by the state board of education; providing for authority to make recommendations involving suspension and revocation of certificates; providing effective date.[121]

The American Association of Colleges for Teacher Education (AACTE), in 1972, reporting the status of professional practices legislation in the various states, indicated eighteen states had practices commissions, standards boards, or combinations of both.[122] A May 1976 report of the National

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93. ARIZ. REV. STAT. § 15-207 (1975).
94. ARK STAT. ANN. 80-1213 (Supp. 1969).
95. *Id.* 80-1616 (1960 Repl.).
96. *Id.*
97. DEL. CODE ANN. 14, § 1325 (1974).
98. GA. CODE ANN. 32-9907 (1975).
99. HAWAII REV. STAT. § 297-4 (Supp. 1975).
100. KANS. STAT. ANN. 21-306 (1974).
101. WEST'S LA. STAT. ANN. 14:417 (1975).
102. *Id.* 17:1203.
103. MASS. G.L.A 71 § 30A (Supp. 1975).
104. *Id.* 71 § 33.
105. MINN. STAT. ANN. § 127-17 (Supp. 1975).
106. MISS. CODE. § 37-9-63 (1972).
107. REV. STAT. OF NEBR. 79-1274 (1968).
108. MCKINNEY'S CONS. LAWS OF N.Y. ANN. § 805 (Supp. 1975).
109. PAGE'S OHIO CODE ANN. § 3313.99 (1960).
110. PURDON'S PA. STAT. ANN. 24 § 11-1112 (1962).
111. TENN. CODE ANN. 49-1408 (1966 Repl.).
112. VERNON'S TEX. CODE ANN. 4.13 (1972).
113. *Id.* 4.16.
114. *Id.* 4.15.
115. VT. STAT. ANN. 16 § 1481 (1975 Repl.).
116. CODE OF VA. § 222-215 (1973 Repl.).
117. REV. CODE OF WASH. 9 05.020 (1970).
118. WIS. STAT. ANN. 118.16 (1973).
119. WYO. STAT. § 21.1-180 (1957).
120. *See,* JOINT COMMITTEE ON PROFESSIONAL PRACTICE REGULATIONS OF THE NATIONAL COMMISSION ON TEACHER EDUCATION AND PROFESSIONAL STANDARDS AND THE COMMISSION ON PROFESSIONAL RIGHTS AND RESPONSIBILITIES, PROFESSIONAL PRACTICES REGULATIONS (1965).
121. LAWS OF FLA. 63-363 (1963).
122. AACTE ALERT 1, at 4 (1972).

Education Association revealed that the number had grown to twenty-five.[123]

If these procedures operate as intended, teacher discipline ceases to be primarily an element of the employee-employer relationship. The teacher is made responsible not only to his employer but also to his profession. The profession, as represented by the professional practices commission, is a participating party in proceedings that might result in disciplinary action with serious consequences.

The potential influence of professional practices commissions may be underestimated because the statutes of many states use the term "recommend" in describing certain of their powers and duties. In reality, the commissions are granted disciplinary authority in addition to that exercised in their advisory role. In each state having a commission, the legislature has empowered this body to establish or develop standards of professional practice. For example, the standards specified by the Iowa statute include, but are not limited to, contractual obligations, competent performance, and ethical practice.[124] Such standards provide grounds for disciplinary action against the teacher, though in some instances the standards must be approved by the state department of education[125] or the teachers of the state. As indicated in the discussion of statutes pertaining to certification, some states expressly list violation of such codes or standards as sufficient ground for revocation of the teaching certificate.[126]

Professional practices commissions may investigate complaints against teachers, collect evidence, and conduct hearings. The South Dakota statute authorizes its commission to issue subpoenas, require attendance of witnesses, require production of written material and records, administer oaths, and take evidence. In addition to recommending courses of action to the appropriate governing bodies, the commission may privately warn or reprimand individual teachers.[127] More recent legislation has gone even further. Alaska statutes now state that "[t]he commissioner, *or* the Professional Teaching Practices Commission subject to approval of the commissioner, may revoke a certificate. . . ."[128] Moreover, in 1973 the Oregon Legislature delegated to that state's commission the authority to initiate proceedings and revoke certificates.[129] Finally, the commissions of California, Indiana, and Illinois also have among their powers the authority to revoke teaching certificates.[130]

123. NATIONAL EDUCATION ASSOCIATION, TEACHER STANDARDS AND LICENSING BOARDS (1976) (ERIC Document, ED 126 023).
124. IOWA CODE ANN. 272A.3 to 272A.6 (Supp. 1975).
125. *See e.g.*, IDAHO CODE 33-1256 (Supp. 1975).
126. *See supra* note 55.
127. S.D.L.C. 13-43-28 (1967).
128. ALASKA STAT. § 14.20.030 (1975).
129. ORE. LAWS of 1973 amending 342.865.
130. *See supra* note 123.

III. CERTIFICATE DENIAL, SUSPENSION, AND REVOCATION

Despite the voluminous legislation enabling authorized officials or agencies to revoke teaching certificates, this penalty is not frequently imposed.[131] Throughout the years, certificates were seldom revoked for teacher conduct that did not clearly fall within the grounds stated in the statutes. Consequently, the judicial challenges have not been numerous and the case law on which to base generalizations is not extensive.

Contract Violations

A compilation of statistics on actual revocation of certificates would probably show contract violations as one of the leading causes. For example, when a teacher, without the consent of the board of education, abandons his or her position during the term of the contract, it is not difficult to present "satisfactory proof of . . . the annulling of a written contract."[132] Because proof of violation can be established, it is likely complaints will be filed and revocations will be issued.

A Nebraska case illustrates the difficulty in formulating a convincing argument for rescinding a suspension or revocation order based on a contract violation.[133] The teacher brought action to review an order by the state board of education suspending his certificate for one year. The suspension resulted from the local board of education's documented complaint that the teacher obviously violated his contract. The primary question considered by the court was—did the teacher have a "just cause" for so doing? The court answered:

> "Just cause" for a contract violation as contemplated by the statute means a legal or lawful ground for such action. The fact that the plaintiff wished to enter some other field of endeavor does not constitute a legal or lawful reason for the violation of his contract. It is therefore apparent that the plaintiff is not entitled to any relief as matter of law.[134]

The lower court's decision to dismiss the case was affirmed.

In a more recent action, a teacher's organization in New Hampshire challenged a state board of education regulation that required revocation of the certificate of any teacher "who denied the spirit and intent of an 'in force' teaching contract or caused a disruption of normal education processes."[135] The trial court temporarily enjoined the board from revoking certificates on the basis of the regulation. However, the supreme court did not

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131. *See* FIFTH, *op. cit supra* note 21
132. R.S. Mo. § 168.071 (1969)
133. Henderson v School Dist. of Scottsbluff, 84 Neb 858, 173 N.W. 2d 32 (1969).
134. *Id.* at 860, 173 N W.2d at 34
135. Timberlane Reg. Educ. Ass'n v. State, 317 A 2d 713 (N H 1975).

rule on the validity of the regulation. Before the case was docketed, the state board agreed not to commence decertification proceedings against members of the organization, changed the penalty from revocation to suspension, and asked the legislature for statutory changes to reflect current board policy. For this reason the court considered the question moot.

Fraud

Fraud is another ground for denial or revocation of certificates that is difficult to contest. Nevertheless, procedural challenges are nearly always possible because "[i]t is settled that a license, of which the nature of a teaching certificate, essential to the pursuit of a livelihood may not be taken away without procedural due process. . . ."[136]

Huntley v. North Carolina State Board of Education[137] illustrates this point. A teacher received initial certification in May 1967 and began teaching the following fall. During the second month of the school year, the superintendent notified her that her certificate was invalid because [redacted] obtained it by fraud. The superintendent's action was based on [redacted] that someone other than the teacher, using her name, had taken the National Teacher Examination, a requirement for certification in that state.

The Fourth Circuit Court first held for the teacher because of the superintendent's *ex parte* revocation (in the presence of one party and not the other). Although the state board of education conducted a hearing, the court concluded that this was not corrective because the notice indicated the hearing's purpose was "to determine if the certificate should be reinstated." The court ordered the board to conduct another hearing to determine whether the certificate should be revoked. When the case again reached the appellate level, the Fourth Circuit Court sustained the revocation.

Immorality

Standards of morality differ from community to community and change from year to year. For this reason, caution must be used in attempting to specify what conduct currently represents "immorality," especially immorality of sufficient magnitude to justify the legal revocation of a teaching certificate.

A New York court denied a teacher's plea for the restoration of his substitute teaching license by the board of education of the city of New York.[138] Following an incident involving some of his students, the teacher

136. Pordum v. Board of Regents of State of New York, 357 F Supp 222, 224 (N.D.N.Y. 1973).

137. 493 F.2d 1016 (4th Cir. 1974). The final ruling on the case was No. 75-2096 (4th Cir., filed July 3, 1976) as reported in 8 SCHOOL LAW BULLETIN at 11

138. Giangrande v. Board of Educ of City of New York, 44 Misc, 2d 762, 254 N Y S.2d 643 (Sup. Ct. 1964)

was warned that his certificate would be revoked for any recurrence. Two years later the teacher was arrested on a morals charge and his license was suspended, but it was restored after his acquittal. After another two-year interval, he was arrested on a similar charge and his license was summarily revoked. Although he was also acquitted on this charge, the board refused to reinstate his license. Because of the legal status of his position, the nature of the certificate, and the regulations governing its issuance and revocation, the court would not require the board to follow procedures other than those stated in its bylaws. Furthermore, the court would not question the sufficiency of the reasons for the revocation.

In California a teacher brought action to compel the state board of education to restore his teaching credential.[139] The revocation by the board was in response to charges of immoral and unprofessional conduct alleging that at a public beach the teacher had "rubbed, touched and fondled the private sexual parts" of another man.[140] In his testimony the teacher acknowledged a past history of homosexual behavior. In affirming the trial court's decision supporting the action of the state board of education, the appellate court said:

> In view of the appellant's statutory duty as a teacher to "endeavor to impress on the minds of the pupils the principles of morality" and his necessarily close association with children in the discharge of his professional duties as a teacher there is in our minds an obvious rational connection between his homosexual conduct on the beach and the consequent action of the respondent in revoking his [certificate].[141]

Does homosexual behavior, then, constitute immoral conduct of sufficient ground to warrant the suspension or revocation of the certificate? The pronouncement of the court in this case seems to leave little doubt:

> Homosexual behavior has long been contrary and abhorrent to the social mores and moral standards of the peoples of California as it has been since antiquity to those of many other peoples. It is clearly, therefore, immoral conduct within the meaning of the education code. . . . It may also constitute unprofessional conduct within the meaning of that same statute as such conduct is not limited to classroom misconduct or misconduct with children.[142]

However, subsequent decisions tend to inject a degree of uncertainty.

In 1969, in *Morrison v. State Board of Education*, the California Supreme Court reviewed a revocation action also resulting from charges of "immoral and unprofessional conduct and an act involving moral turpitude."[143] The charges arose from a "limited noncriminal physical relationship of a homosexual nature" that the plaintiff had engaged in with a fellow

139. Sarac v. State Bd. of Educ., 249 Cal. App 2d 58, 57 Cal Rptr 69 (1972).
140. *Id.* at 60, 57 Cal. Rptr. at 71
141. *Id.* at 63, 57 Cal. Rptr at 72-73.
142. *Id.*
143. 1 Cal 3d 214, 82 Cal Rptr 175, 461 P 2d 375

teacher.[144] The relationship occurred in Morrison's apartment on four separate occasions in a one-week period. Approximately one year later the other teacher reported the incidents to his superintendent and Morrison resigned his position. The revocation occurred some three years after the incident.

The court distinguished between the "public" and "private" conduct of a teacher and placed the burden of proof on the licensing agency to establish a relationship between the questioned conduct and fitness to teach. According to the opinion:

> The power of the state to regulate professions and conditions of government employment must not arbitrarily impair the right of the individual to live his private life, apart from his job as he sees fit.[145]

The court also specified guidelines for use in determining whether the teacher's allegedly immoral conduct warrants disciplinary action:

> [The] board may consider such matters as the likelihood that the conduct may adversely affect students or fellow teachers, degree of such adversity anticipated, proximity or remoteness of the time of conduct, type of teaching certificate held by the party involved, extenuating or aggravating circumstances, if any, surrounding the conduct, praiseworthiness or blameworthiness of motives resulting in the conduct, likelihood of recurrence of the questioned conduct, and the extent to which disciplinary action may inflict adverse impact or chilling effect on the constitutional rights of the teacher involved or other teachers. . . .[146]

In ruling that this particular teacher's certificate must be restored, the court evidently anticipated misinterpretation of its decision. The judge explained: "We do not, of course, hold that homosexuals must be permitted to teach in the public schools of California. We require only that the board find that the individual is not fit to teach."[147]

The distinction between private and public homosexual behavior was again made in a 1972 case, *Moser v. State Board of Education*.[148] After prefacing its comment with the statement that "[i]t will serve no useful purpose to recite herein the sordid details of the testimony which described the conduct of the appellant giving rise to the charges against him," the court went on to relate that the teacher "while in public view in a public restroom masturbated his exposed penis and then touched the private parts of . . .

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144. *Id.* at 218, 461 P.2d at 378, *i.e.*, not involving sodomy, oral copulation, public solicitation of lewd act, loitering near public toilets, or exhibitionism.

145. *Id.* at 239, 461 P.2d at 394

146. *Id.* at 229, 461 P.2d at 386

147. *Id.* at 239, 461 P.2d at 394. *See* N. Horenstein, *Homosexuals and the Teaching Profession*, 20 CLEVE. ST. L. REV. at 133 for comments on this decision. *See also Unfitness to Teach: Credential Revocation and Dismissal for Sexual Conduct*, 61 CALIF. L. REV. 1442-62 (1973).

148. 22 Cal App. 3d 988, 101 Cal. Rptr. 86 (1972).

(another) male person."[149] Following the *Sarac* rationale, the court affirmed its position that homosexual behavior in a public place constitutes sufficient proof of unfitness for service in the public school system.

Although the *Morrison* case appeared to have removed most, if not all, restrictions on the teacher's private life unless an adverse effect on teaching performance can be shown, a subsequent decision suggests some limiting conditions. As reported in the previous monograph, a California superior court refused to reinstate an elementary school teacher's credential revoked for conduct associated with her membership in a "swingers" club. The teacher appealed this decision.[150]

The California Supreme Court reviewed the record, which showed that the state board had heard testimony from a Los Angeles Police Department undercover agent who had observed the teacher engaging in oral sex with men other than her husband at a meeting of the group. She was later arrested and charged with the misdemeanor, outraging public decency, fined, and placed on probation. The husband also testified at the hearing acknowledging that his wife had had sex with other men while he was present. He also mentioned that he and his wife had appeared four years earlier (in facial disguise) on a television talk show to discuss their particular lifestyle. In her defense, the teacher relied on *Morrison*, contending that her private life was unrelated to her fitness to teach and offered in evidence her principal's evaluation and her contract to continue teaching. In the appeal, the California Teachers Association and the National Education Association filed briefs supporting the teacher.

A divided court, in rejecting the teacher's arguments, distinguished the case from *Morrison*, terming the teacher's conduct "semi-public" rather than "private" and alluding to the testimony concerning the teacher's fitness. The majority opinion held that:

> In the instant case, the board and the trial court were entitled to conclude, on the basis of the expert testimony . . . and the nature of the misconduct involved that [the teacher's] illicit and indiscreet actions disclosed her unfitness to teach public elementary schools.[151]

In the final case in this section, the Iowa Supreme Court considered a revocation action for immorality based on adultery.[152] The plaintiff was an art teacher/coach who had an affair with a home economics teacher, wife of a local farmer. The farmer confirmed his suspicions concerning the illicit relationship by hiding in the trunk of his wife's car during a rendezvous with her lover. He consulted an attorney regarding divorce action but was informed that further proof was needed. Then he, along with a "neighboring par-

149. *Id.* at 989, 101 Cal. Rptr. at 87
150. Pettit v. State Bd. of Educ., 109 Cal. Rptr. 665, 513 P 2d 889 (1973).
151. *Id.* at 670, 513 P 2d at 894.
152. Erb v. Iowa State Bd. of Pub. Instr., 216 N W.2d 339 (Iowa 1974).

·ty" of his friends, discovered and photographed the couple partially clothed in the back seat of her car on a country road. The farmer told his wife not to return home and ordered the coach to inform *his* wife of the situation. The coach offered to resign his position, but the school board refused to accept his resignation. Also, at this point, the affair terminated. The state board instituted revocation proceedings and cancelled the certificate in spite of the strong support of pupils, teachers, administrators, and parents. The trial court sustained the action, whereupon the defendant appealed to the supreme court.

Quoting freely from *Morrison*, the supreme court held that the state board had failed to establish a relationship between the coach's conduct and his fitness to teach since there was no finding of fact. In reversing the lower court decision, the court said:

> We emphasize the board's power to revoke teaching certificates is neither punitive nor intended to permit exercise of personal moral judgment by members of the board. Punishment is left to criminal law, and the personal moral views of board members cannot be relevant. A subjective standard is impermissible and contrary to obvious legislative intent. The sole purpose of the board's power is to provide a means of protecting the school community from harm. . . .[153]

Criminal Conviction

A criminal conviction may result in the denial or revocation of the teaching certificate. A number of states expressly require that the certificate be revoked for "conviction of a felony or crime involving moral turpitude."[154] In other states not having such a provision, the issuing agency may rely on such grounds as "immorality" or "cause."

An Oregon teacher was denied a five-year certificate on the ground that he failed to present evidence of good moral character.[155] Before becoming a teacher, he had been convicted of several burglaries committed while serving as a security guard and had served eighteen months of a two-year sentence. The Oregon Supreme Court upheld the state board of education's action, indicating that the judgment to deny the certificate was within the board's discretion.

This decision raises the question whether the outcome would have been the same had revocation rather than denial of the certificate been the issue.[156] In *Fountain v. State Board of Education*, the court held that a California statute calling for the suspension of a certificate "for conviction of

153 *Id.* at 345.

154 *See supra* Table 2.

155. Application of Bay, 378 P 2d 558 (Ore 1963)

156. In general the courts have permitted licensing agencies to exercise a greater degree of discretion in the initial issuance of certificates than in their revocation.

sex offense" does not operate retroactively.[157] Likewise, the conviction for the crime, in this instance "lewd vagrancy," had occurred prior to the issuance of the initial certificate. The statutes contained no provision permitting revocation for grounds that would have prevented the initial issuance of the certificate.

The court rulings leave some doubt whether the California statute quoted above constitutes one or two grounds for revocation. In *Comings v. State Board of Education*,[158] the court held that a teacher's credential may not be revoked solely for conviction of the crime of possession of marijuana. The court indicated that the board must show a connection between the offense and fitness to teach—for example, adverse school relationships or excessive notoriety impairing these relationships.

In *Purifoy v. State Board of Education*,[159] another California teacher whose credential had been revoked for conviction of a crime involving moral turpitude asked the court to order the state board to rescind its action and grant him a hearing on the charges. The court denied the petition, observing that the violators of this statute "constituted a class which the legislature identified as constituting a dangerous element in the [illegible] community."[160]

A New York teacher contended that the revocation of his certificate by the commissioner of education for "cause" violated the due process and equal protection clauses of the federal Constitution.[161] During a leave of absence the teacher had taken to serve as a member of the county legislature, the teacher was convicted of the crime of conspiracy involving bribery of public officials and was sentenced to a three-year prison term. After his release on parole, he asked to resume his teaching duties. The commissioner enjoined the local board from reemploying or reinstating the teacher and ordered him to show cause why his certificate should not be revoked. Subsequently, the state board held the hearing and revoked the certificate.

The purpose of this particular judicial proceeding was to consider the teacher's application (joined by the school board) to convene a three-judge court to consider the constitutional questions raised. The court held that there was no substance to the teacher's claim that revocation for "cause" is unconstitutionally vague and indefinite or to his claim that he had not been afforded due process by the state board. In dismissing the application, the court said: "The standard of conduct for a teacher is not unlike the standards familiarly required in the other professions . . . and such unsupported allega-

157. 157 Cal. App. 2d 281, 320 P.2d 899 (1958)
158. 23 Cal App. 3d 94, 100 Cal Rptr. 74 (1972)
159. 30 Cal. App. 3d 187, 106 Cal Rptr 201 (1973)
160. *Id.* at 197, 106 Cal Rptr at 208
161 Pordum v Board of Regents of State of New York, 357 F Supp 222, 224 (N D.N Y. 1973)

tion by bare statement will not create a substantial federal question such as to necessitate the convening of a three-judge court."[162]

Un-American Activities

Legislators have attempted to ensure that the schools instill the ideals of citizenship in their pupils and that teachers not use their positions to disseminate subversive beliefs. The resulting legislation takes various forms including required loyalty oaths, required instruction, prohibited organizational memberships, and prohibited instruction. Noncompliance often carries the penalty of denial or revocation of the teaching certificate.

The certificates of two teachers were revoked on the ground that each had sworn falsely to the loyalty oath required by California law. This oath contained the provisions:

> That within the five years immediately preceding the taking of this oath I have not been a member of any party or organization, political or otherwise, that advocates the overthrow of the government of the United States or the State of California by force or violence.[163]

At the time they took the oath they were both members of the American Communist Party. On the basis of the facts presented, it was held that the state board did not establish that the Communist Party advocated the forceful overthrow of the United States and California governments or that the teachers knew at the time of signing the oaths what the party advocated. Therefore, the certificates were reinstated.

In 1970, a three-judge district court ruled that the California loyalty oath is an unconstitutional condition for certification.[164] The weight of evidence now indicates that membership in a political organization *per se* is not a permissible ground for disqualifying applications for the profession or for revoking a certificate or license to teach. The state probably may go no further than to require that the teacher be willing to affirm a general commitment to uphold the Constitution and to perform the duties of his position.[165]

Failure to Meet Academic Requirements

In a number of states the certification standards require that the teacher, to qualify for permanent certification, complete a master's degree or a specified number of graduate credit hours. A New York teacher defied such a requirement and petitioned the courts to order validation of her licenses. She challenged the reasonableness of the standards, maintaining that her excellent scholastic record and her service to the profession should be accepted in lieu of the required thirty graduate hours. The court denied the petition,

162. *Id.* at 226.
163. Mack v. State Bd. of Educ., 224 Cal. App. 2d 370, 36 Cal. Rptr. 667, 677 (1964).
164. MacKay v. Rafferty, 321 F. Supp. 1177 (N.D. Cal. 1970).
165. *See* W. Van Alstyne, *The Constitutional Rights of Teachers and Professors*, 1970 DUKE LAW J. 841.

noting that "due to the nature of the matter, [the court was] unable to evaluate the case on its merits."[166] In other words, the court acknowledged its inability to base a decision on the educational validity of the requirement.

A more recent action challenged this same requirement on the basis of sex discrimination.[167] The board of examiners cancelled the teacher's certificate for failure to obtain the required coursework in the stipulated five-year period. The teacher, who had taken maternity leave during that time, contended that the time requirement imposed a special hardship on women as a class. The commissioner held that there was no equal protection violation since all persons are treated alike.

Two academic requirements for certification were tested in North Carolina. The state supreme court upheld a state board regulation requiring teachers to renew their certificates every five years by earning additional credit.[168] The regulation, according to the court, had a "reasonable basis" and did not violate the due process clause. A federal district court struck down another certification requirement of that state as having no rational basis.[169] This requirement stipulated that certificates be denied to applicants scoring less than 950 on the National Teacher Examination. The court pointed out that the state had failed to validate the cutoff score and that the regulation appeared to discriminate against black applicants.

IV. CONTRACT NONRENEWAL AND TERMINATION

Because of the large volume of litigation produced by the nonrenewal and termination of teachers' employment contracts, the coverage of this monograph is limited primarily to the representative decisions of the past five years. The discussion focuses particular attention on the specific teacher conduct that precipitated the board's disciplinary action and the extent to which that conduct sufficiently justified the action. The cases in which the court's opinion turned on procedural rather than substantive grounds are so identified.

The tendency for dismissed teachers to resort to the courts has increased markedly during the present decade.[170] There are three interrelated factors

166 Turetsky v Allen, 59 Misc 2d 895, 301 N Y S.2d 890 (Sup Ct 1968).

167 *In re* Leitman, 14 Educ Dept Rep ____, N Y Comm'r Dec No. 9006 (1975).

168 Guthrie v Taylor, 279 N C 703, 185 S E.2d 193 (1971)

169. United States v North Carolina, 400 F Supp 343 (E D N.C. 1975). *See also* Georgia Ass'n of Educators Inc v Nix, 407 F Supp 1102 (N D Ga 1976) in which the court held that a required 1225 N T.E score for six-year certificates had no rational relationship to the state purpose and was therefore violative of the equal protection clause

170. *See* THE YEARBOOK OF SCHOOL LAW, 1972 to date annually, for comprehensive coverage of dismissal cases *See also Grounds for Teacher Dismissal*, 21 S D L REV 160-180 (1976)

that have obviously contributed to this increase: (1) easy access to the federal courts, (2) prospects for collecting damages as well as gaining reinstatement in civil rights actions under 42 U.S.C. § 1983, and (3) a broader constitutional basis for challenge under the Fourteenth Amendment's "liberty" and "property" provision as enunciated in the United States Supreme Court's *Roth* and *Sindermann* decisions.[171] Another important factor is the financial support for litigation that professional organizations provide their members.

The teacher conduct resulting in nonrenewal or termination of the employment contract is herein categorized roughly according to the statutory grounds for dismissal. There are limitations to this organization, however. These categories are not mutually exclusive, and the school board may attempt to justify its action on several statutory grounds. Finally, because few states specify grounds for nonrenewal, the reasons, if given, may not fall into any of the usual dismissal categories.

Incompetency

Dismissals for incompetency, as pointed out in the previous monograph, can take on the character of a disciplinary action. This is especially true in situations in which the teachers refuse to take steps to improve their classroom performance. Also, school boards may use the ground of incompetency to justify dismissal not only for ineffective job performance but also for a variety of behaviors that may be related only indirectly to the employee's duties.

If a school board is to defend the nonrenewal or termination of a teacher's contract, its chances of success are enhanced by a detailed list of specific documented charges. For example, the United States district court in New York rejected a teacher's claim that his dismissal was arbitrary, capricious, and in violation of his right to due process.[172] The teacher's dismissal resulted from a series of problems: (1) parents complained that pupils were being held after class and that one girl pupil was physically abused; (2) this girl reported to the principal that she was pushed and injured by the teacher, and another pupil corroborated her claim; (3) the principal found that the teacher's room was in total disorder when he went to discuss the matter with him; and (4) the principal, when attempting to observe the teacher's performance, found him asleep in the teachers' lounge.

In nonrenewal actions, unless there is a statutory requirement to do so, the school board may decide whether or not to give reasons. The courts have said that a board may refuse to renew the contract for no reasons or for good reasons, but not for bad (constitutionally impermissible) reasons.[173] If the

171. Board of Regents of State College v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann, 408 U.S. 593 (1972).

172. Canty v. Board of Educ., City of New York, 312 F. Supp. 254 (S.D.N.Y. 1970).

173. *See* Shumate v. Board of Educ. of the Cty. of Jackson, 478 F.2d 233 (4th Cir. 1973).

board provides no reasons or reasons that the teacher denies as being the actual basis for the nonrenewal, the burden of proof is on the teacher to establish that the real reasons were in fact constitutionally impermissible.

A long list of job-related reasons for not renewing a high school principal's contract convinced the federal district court in Wyoming that no constitutional violations were involved.[174] The principal had maintained that the real reason for the nonrenewal was his outspokenness on the system for handling football ticket sales and the organization and administration of the school's career education program.

As suggested previously, Fourteenth Amendment violations may result from a statement of reasons that damages the individual's reputation and affects his freedom to move to another position. A guidance counselor charged that the reasons given for his nonrenewal deprived him of such "liberty" and that his nonrenewal was, therefore invalid without a full evidentiary hearing.[175] In short, these reasons were the loss of confidence in the counselor by the faculty because he refused to discuss pupils' problems with them and the lack of confidentiality in his handling of information about students. The administrators and board members did not communicate these reasons outside the school system. Holding that there was no due process violation, the court quoted *Russell v. Hodges*:[176]

> Indeed, a general rule that informing an employee of job-related reasons for termination creates a right to a hearing in circumstances where there was no constitutional requirement for the state to do anything would be self-defeating; the state would merely opt to give no reasons and the employee would lose the benefit of knowing what might profit him in the future.

When reasons are given, the question sometimes arises as to how far the employer must go in proving the charges. The reasons given for not renewing a teacher's contract were that he swore or called a boy a bad name, that he assigned too much busy-work that did not figure into the grade, that he did not look at a three-page assignment that his student prepared, and that he gave all students the same grade on group discussion. In ruling that the board had not acted arbitrarily, the Tenth Circuit Court said, "If a school board is not required by procedural due process to give any reasons, we cannot see why a statement of reasons, if given, need be based on substantial evidence."[177]

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174. Schmidt v Fremont Cty. School Dist. No. 25, 408 F. Supp. 781 (D. Wyo. 1976).

175 Springston v King, 399 F Supp. 985 (W D. Va. 1975). In Codd v Velger, 45 U.S.L W 4175, 4176 (February 22, 1977), a case initiated by a dismissed New York City police officer, the United States Supreme Court noted that the purpose of a hearing is to provide the person an opportunity to clear his name and "[o]nly if the employer creates and disseminates a false and defamatory impression about the employee in connection with his termination is such hearing required."

176. 470 F.2d 212, 217 (2d Cir 1972)

177. Weathers v. West Yuma Cty School Dist. R-J-1, 530 F.2d 1335, 1342 (10th Cir. 1976).

The *Weathers* case, as well as the other cases presented thus far in this section, were § 1983 civil rights actions, but similar questions may arise under state statutes. On the question of sufficiency of evidence in a nonrenewal case, the South Dakota Supreme Court reached an almost identical conclusion when it reviewed the release of a first-grade teacher.[178] Briefly, the reasons given were complaints from parents, reluctance to try new teaching methods, lack of confidentiality in discussing individual students, and lack of energy to move about the room. The opinion stated that "the statute does not require the board to justify its decision in the circuit court by a preponderance of evidence."[179]

The evidence supporting a dismissal for incompetency appears to carry greater weight if the teacher is given ample warning and is provided sufficient opportunity to correct the ineffective performance. For example, a decision not to reemploy a teacher because of his inefficiency and incompetency was affirmed by the New Mexico Court of Appeals, which held that substantial evidence existed to support the findings of the local board of education.[180] Records introduced showed dissatisfaction with the teacher's performance in March 1967. In February 1968, he was again informed of specific deficiencies in grading practices, teaching methods, and disciplining students.

State statutes frequently require the notice of deficiencies and the time period for correcting them before a teacher may be dismissed for incompetency. Failure to adhere to the statutory requirements is most likely to invalidate the dismissal. In *Blue Springs Reorganized District v. Landuyt*,[181] the controversy began when a Missouri tenured teacher paddled a pupil. Although the principal warned the teacher not to use corporal punishment, she later slapped a student, breaking the ring on her finger and causing the boy a split lip and bruised eyes. The board, charging incompetency, inefficiency, and insubordination, began proceedings and terminated the teacher's contract. The court ordered the teacher reinstated because the board had not complied with the letter of the statute regarding proper notice. A similar situation arose under Illinois law, which requires notice of "remedial" deficiencies prior to notice of intention to dismiss.[182] Both the superintendent and the board had informed the teacher of unsatisfactory aspects of her performance but had failed to indicate that dismissal would follow unless the problems were corrected. The court, in overturning the dismissal, also questioned the board's reliance on testimony presented mainly by relatives of the members.

178. Mortweet v. Ethan Bd. of Educ., Davison Cty, 241 N.W.2d 580 (S.D. 1976).
179. *Id.* at 582.
180. Wickersham v. New Mexico State Bd. of Educ., 81 N.M. 188, 464 P.2d 918 (1970).
181. 499 S.W.2d 33 (Mo. App. 1973).

Assuming that procedural requirements are met, the courts usually consider substantiated deficiencies and an unwillingness to correct them sufficient cause for nonrenewal and termination. The Pennsylvania Commonwealth Court affirmed the dismissal of a teacher, noting that the hearing record presented evidence that the classroom time was poorly budgeted, that presentations were confused, and that the teacher refused to make the necessary adjustments.[183]

The case of *Jergenson v. Board of Trustees* illustrates a teacher's dismissal for incompetency that was based primarily on the product of his students.[184] The product was the content of a school newspaper prepared under his supervision. The board presented other evidence: a poem, alleged to be obscene, that remained on the teacher's chalkboard for two weeks; the use of the word "rape" while teaching; and his failure to maintain discipline while a guest lecturer (a local businessman) was speaking to the class. The general charge was made that "your philosophy and practice of education is detrimental to the best interest of high school students."[185]

Although the Wyoming Supreme Court affirmed the lower court's decision supporting the dismissal, Judge Gray, in a detailed and convincing dissent, observed:

> If a teacher can be discharged for incompetency on the basis of the record before us in this case, it is quite apparent that a school board would have little difficulty in dismissing a teacher who, for flimsy reasons, had incurred the ill-will of the board.
> [The teacher] had apparently incurred the ire of the board members by flaunting before them the style of hair, a beard, and a dress of which they disapproved. . . . [In conference with them] he made known his views of legalization of marijuana and student sit-ins.[186]

Referring to the evidence, the judge noted that the principal and the superintendent were also responsible for the content of the newspaper and that the results of a student survey on the teacher's classroom effectiveness favored him.

A final comment by Judge Gray appears to indicate that this decision was inconsistent with other rulings throughout the country at that time:

> . . . today however in light of the A.P.A. and the school code and the fairly recent decisions, particularly of the federal courts, dealing with due process with academic freedom, with the right of free speech, and the Civil Rights Act, we have an entirely new "ball game" and these problems must be approached accordingly.[187]

182. Gilliland v. Board of Educ., 35 Ill App. 861, 343 N E.2d 704 (1976).
183. Hickey v. Board of School Directors, 16 Pa Cmwlth. 319, 328 A.2d 549 (1974).
184. 476 P.2d 481 (Wyo. 1970).
185. *Id.* at 482.
186. *Id.* at 488.
187. *Id.* at 489.

Judge Gray might have had a decision such as *Mullen v. Board of Education* in mind when he made this statement. In overturning the dismissal of a teacher for alleged incompetency, the court observed:

> Also of some relevance is the fact that questions concerning Mullen's ability arose only after he became the building representative for the Dubois Area Educational Association in which capacity he found it necessary to press complaints on the principal and superintendent with regard to the treatment of two fellow teachers.[188]

The teacher's performance was rated entirely satisfactory on four occasions, unsatisfactory only once, and that just four days before his dismissal. The courts, then, are suspicious of board of education charges that a teacher who was formerly considered competent has suddenly become incompetent, especially when conflict between the board and the teacher has developed on points that are unrelated to his teaching performance.

One final example illustrates the use of the incompetency ground to dismiss a teacher for her conduct outside the classroom. During the school year, the teacher began sharing her dwelling with a single man. The board's stated concern was for the effect of this conduct on her students. The federal district court rejected the claim for reinstatement and damages. The Eighth Circuit Court upheld the decision but remanded so that the denial for relief could be for "failure to establish a claim for damages to serve to avoid or lessen any stigma which may attach to her teaching record."[189]

Neglect of Duty

Neglect of duty, if the teacher is actually negligent, can usually be proved without much difficulty. This is especially true if the teacher's duties are well defined and the school maintains reasonably adequate personnel records. Under these conditions the courts are not likely to reverse the dismissal unless legally incorrect or inadequate procedures were followed.

A 1947 decision established that a teacher may not be discharged for neglect of duty if this action deprives him or her of privileges secured by the laws of the United States.[190] The particular privilege questioned was federal jury duty; which, in this instance, resulted in the teacher's absence from the classroom from March 7 through April 4. The board of education dismissed the teacher on recommendation of her principal, and the New York commissioner of education affirmed this action because the state statutes permitted the summary dismissal of probationary teachers.

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188. *Id.* at 488. Judge Gray is referring to the Wyoming Administration Procedures Act.
189. *See* Sullivan v. Meade Cty. Indep. School Dist. No. 101, 530 F.2d 799 (8th Cir. 1975) as an example of an attempted teacher dismissal from a military dependent's school
190. Romar v. Keyes, 162 F.2d 136 (2d Cir. 1947).

After noting the lack of legal precedents construing privileges secured by federal statutes, Judge Hand observed:

> We do not see how it can be questioned that to permit a person who wishes to do so to serve on a federal jury is to deny an interest which the statute means to protect. True, the plaintiff did serve upon the jury—literally, she was not "prevented" from doing so—but it would emasculate the act either to deny protection against reprisal to those whom threats did not deter, or to leave without recourse those who were later made victims of reprisal, of which they had not been warned.[191]

An Arkansas teacher's aide attempted to use the above decision to prove that the nonrenewal of her contract was based on constitutionally impermissible grounds.[192] She had missed school to serve as clerk in a school board election in spite of the board's refusal to grant permission. The Eighth Circuit Court affirmed the district court's rejection of her claim:

> The right allegedly infringed in this case, i.e. the right to serve as an official in a school board election, is neither a constitutional right nor a basic personal right secured under federal law. The privilege ... arises under state not federal law...[193]

Although the exercise of federal constitutional and statutory rights will be protected, it is apparent the courts will not ignore substantial dereliction of duty or the abuse of the position. In a case reported in the previous monograph a black principal in Georgia claimed his dismissal resulted from racial bias.[194] However, evidence presented indicated that he failed to hold fire drills, to secure buildings (which resulted in loss and damage of school property), to attend certain school meetings, to cooperate in giving achievement test, and to follow school regulations on the use of state-adopted textbooks. Evidence also showed that he disrupted certain faculty meetings while denouncing the actions of the central administration. The courts accepted this evidence as sufficient grounds for dismissing the principal.

Another example involved a school superintendent's political activity during a school board election.[195] The dicta by Judge Palmore merits repeating:

> A school superintendent cannot be expected to confine his extracurricular activities to birdwatching while a covetous rival is out campaigning for a school board to unseat him. So if he remains within the confines of propriety, neither neglecting his duties nor using his powers to coerce those who are subject to his official influence, he is free to engage in political activity whether it concerns school elections or otherwise. But it is an equally harsh fact of life that if he loses, his

191. *Id.* at 139.
192. Evans v. Page, 516 F.2d 18 (8th Cir. 1975).
193. *Id.* at 21.
194. Glover v. Daniel, 318 F Supp. 1070 (N.D. Ga. 1969).
195. Bell v Board of Educ. of McCreary Cty., 450 S.W.2d 229 (Ky. 1970).

record of performance had better be above reproach, because the winners are also human and will scrutinize his armor for an Achilles heel. Unfortunately, it is an unavoidable risk of the game, and that is what happened in this case.[196]

Evidence showed that the superintendent used funds from federal programs to influence votes and failed to hold fire drills and to correct fire hazards revealed by a fire marshal's inspection. The court ruled this evidence was sufficient to warrant discharge. This and the previous cases clearly support Judge Palimore's observation that if a teacher engages in controversial, but legally protected or sanctioned, activity, it is imperative that he "keep his house in order."

More recently, a tenured high school principal lost his position for neglect of duty when he left school one week early to register for college classes.[197] The testimony was conflicting, with the principal asserting that he had discussed being away with the superintendent and had received his permission; whereas the superintendent maintained that he learned of the absence only after he visited the school and found the principal gone. The superintendent further testified that he had to assume the principal's duties of signing checks and supervising National Youth Corps students. In the dismissal hearing, the board court chose to believe the superintendent. The court ruled that the board had not exercised its discretion arbitrarily or unreasonably.

Dismissal actions for neglect of duty have failed when procedures were deficient and evidence was lacking. A Florida teacher won reinstatement after she established that three hearing panel members whom she deemed prejudiced failed to disqualify themselves as required by law.[198] The basis for the teacher's dismissal was neglect of duty as evidenced by one or more days' absence without leave. In another case, the employer was unable to establish that a principal neglected his regular duties while also serving as a "Head Start" director.[199] The dispute arose over the alleged dual compensation he received during the summer, but the court observed there was no evidence the principal was paid for work not performed.

Finally, a Wyoming teacher was notified of termination and given a letter listing the charges of neglect of duty, failure to follow district policy, inability to establish rapport with students, and insubordination. In the subsequent hearing, the board decided to dismiss the teacher only on the grounds that she failed to establish rapport with students and that she was unable to control students. The state supreme court reversed the board and the district

196. *Id.* at 233
197. Howell v Winn Parish School Bd., 321 So. 2d 420 (La. 1975)
198. State *ex rel.* Allen v Board of Pub. Instr. of Broward Cty., 214 So. 2d 7 (Fla. 1968).
199. Brownsville Area School Dist. v Alberts, 436 Pa. 429, 260 A 2d 765 (1970)

court because of procedural deficiencies.[200] The court indicated that the board made no specific finding of fact regarding the "rapport" charge and that the other charge was not listed in the notice. The opinion ruled also that the lack of findings of fact violated the state's administrative procedures act. The dissenting judges, however, said: "This case has a refreshing feature brushed off by the majority. Every one of the 17 incidents, . . . was carefully documented as to date and detail and maintained as a school record."[201] The dissent noted, too, that the teacher made no objection to the added charge.

Insubordination

The generic definition of insubordination is "unwillingness to submit to authority."[202] As the adversary role of employer and employee gained wider acceptance, there appeared to develop a simultaneous increase in the resistance to school board authority. It is not surprising, then, that "insubordination" has become the most frequently cited reason for removing errant teachers. Because of the size of the body of case law in this area, the material is organized according to the subject matter of the board policy or administrative regulation violated and/or the objectionable behavior involved.

Residency.

In recent years, teachers have challenged board policies that require the teachers to live within the district. The federal district court struck down Kansas City, Kansas, board's residency policy.[203] The rule, in the court's view, lacked a reasonable basis and deprived the teachers of equal protection of the laws. The regulation forced the teachers to choose between the right to live and the right to work where they desired. In 1972, also, a Kentucky school board refused to renew the contracts of two teachers, a married couple, because they were not natives of the country. The appellate court ruled that the practice of hiring only county natives was constitutionally suspect, and therefore invalid, unless the board could demonstrate a compelling state interest.[204]

More recently, residency requirements have withstood judicial tests. In a 1975 case, *Park v. Lansing School District*,[205] a school administrator who had not been rehired for refusal to comply with the policy charged that the rule violated the equal protection provision. The trial court dismissed the complaint, and the appeals court affirmed the decision. Exempting ad-

200. Powell v. Board of Trustees of Crook Cty. School Dist. No. 1, 550 P.2d 1112 (Wyo. 1976)
201 *Id.* at 1118
202. WEBSTER'S SEVENTH NEW COLLEGIATE DISCTIONARY at 439.
203. Hanson v Unified School Dist. No 500, Wyandotte Cty., 364 F Supp. 330 (D. Kan. 1973).
204. Johnson v. Dixon, 501 S.W.2d 256 (Ky 1973).
205. 62 Mich. App 397, 233 N W 2d 592 (1975).

ministrators employed before the adoption of the policy was not an unreasonable exercise of the board discretion.

The Cincinnati school system was also able to justify its residency policy.[206] The Sixth Circuit Court accepted the following listing as the needed "rational" basis:

(1) aids in hiring teachers highly motivated and deeply committed to an urban education
(2) more likely to vote for district taxes, less likely to engage in illegal strikes, more likely to help with passage of tax levies
(3) more likely to be involved in school and community activities
(4) more likely to gain sympathy, understanding for the racial, social, economic and urban problems of children they teach
(5) in keeping with goal of encouraging integration in society and schools.[207]

The court rejected the teachers' argument that the rule violated their equal protection rights and that intrastate travel was constitutionally protected.[208]

The most authoritative decision to date on residency requirements concerned a public employee other than a teacher. In *McCarthy v. Philadelphia Civil Service Commission*,[209] the United States Supreme Court considered the constitutionality of a city ordinance requiring employees to live within the city. A fireman, who had been dismissed after he moved over the state line into New Jersey, charged that the ordinance violated his right to interstate travel. The Court rejected this argument and went on to explain that its previous rulings cited "did not question the appropriately defined and uniformly applied bona fide residence requirements."[210]

Professional Growth

Boards of education often adopt policies designed to upgrade their teaching faculties. Failure to comply with the requirement for professional improvement usually carries a penalty—possibly dismissal for insubordination. An Illinois teacher lost her job for failure to abide by the following provision of a negotiated agreement: "...any teacher who does not have a Master's degree when initially employed to teach...shall earn a Master's within six years of his initial employment."[211] The teacher's contract provided for dismissal for failure to carry out any rule. The court, however, ruled that this sanction must yield to the lesser penalty stated along with the

206. Wardwell v Board of Educ of the City School Dist. of Cincinnati, 529 F 2d 625 (6th Cir. 1976).
207. *Id* at 628
208. *Id* at 629. The court relied on United States v Caroline Products Co, 304 U S 144, 151 (1938).
209. 96 S Ct 1154 (1976)
210. *Id* at 1155
211. Heifner v Board of Educ, 32 Ill App 3d 83, 335 N.E 2d 600, 601 (1975)
212. Martin v Harrah Indep School Dist, 543 P 2d 1370 (Okla 1975), *rehearing denied* January 13, 1976

professional growth requirement that failure to comply will cause the teacher's salary to be frozen.

The facts of a 1976 Oklahoma case were quite similar.[212] After much urging by the board, the teacher continued to ignore its professional growth policy, which stated that a teacher with a bachelor's degree must earn five semester hours every three years. The board carried out its threat not to renew her contract, and the teacher appealed to the state's professional practices commission. While this appeal was pending, the teacher filed a petition with the court for reinstatement and damages. The trial court held for the teacher, and the court of appeals affirmed the decision. However, the Oklahoma Supreme Court held that the trial court was without jurisdiction because the teacher failed to exhaust administrative remedies. A dissenting judge pointed out that the board's own rules provided the specific penalty of withholding the salary increment.

Unauthorized Absences

This category of insubordination cases typically does not involve violation of board policy but rather the teacher's failure to comply with the board's disapproval of a request. For example, a Kentucky teacher, after the board denied his leave of a request. For example, a Kentucky teacher, after the board denied his leave request, discontinued his duties and began a paid full-time job with the American Federation of Teachers.[213] The court ruled that once a teacher voluntarily vacates his position the board is under no obligation to reemploy him.

In Colorado a teacher was dismissed for insubordination after she ignored the board's denial of her request to be excused to attend a religious celebration.[214] The state's tenure panel upheld the board's action, and the teacher appealed to the Civil Rights Commission rather than to the courts as provided by the tenure law. The commission held for the teacher, and the trial court reversed the commission's decision. Finally, the state supreme court affirmed the lower court ruling because the teacher failed to follow prescribed review procedure.

Insubordination was also one of the charges against a New York teacher who defied the rejection of his leave request.[215] The teacher had just returned from a full-year's leave with pay when he asked for twenty-one days to attend a New York University Senate meeting as a member. He attended the meeting and falsely certified that he was entitled to sick leave. The highest state court upheld the dismissal, indicating that the evidence was sufficient

213 Miller v. Noe, 432 S.W. 2d 818 (Ky. 1968)

214 Timberfield v. School Dist. No. 11, 185 Colo. 165, 522 P. 2d 730 (1974). *See* M. Rosenfeld, *Religious Rights of Public School Teachers*, 23 U.C.L.A. L. Rev. 763-791 (1974).

215 Pell v. Board of Educ. of Union Free School Dist. No. 1, 34 N.Y. 2d 222, 313 N.E. 2d 321, 356 N.Y.S. 2d 833 (1964)

to support the charges of insubordination, conduct unbecoming a teacher, and neglect of duty.

Corporal Punishment

Unless restricted by state law, school boards generally have the authority to adopt policy controlling the use of corporal punishment. Attempts to limit the teachers' use of physical means to control student behavior are often a source of conflict.

A teacher may not be dismissed for violation of rules and regulations that do not exist or of rules that are enacted after the alleged violation occurred. In Colorado a superintendent accused a teacher of "physically manhandling students" in her class "even though action of this sort is definitely against stated school board policies."[216] In testimony, the teacher admitted she occasionally used physical force in disciplining students. The Colorado Supreme Court held, however, that the discharge was improper because "there was no evidence that the school board had passed any rule or regulation regarding corporal punishment."[217]

Neither may school administrators adopt rules banning the use of corporal punishment in conflict with board policy. In this 1975 case,[218] the teacher challenged her dismissal for insubordination and conduct unbecoming a teacher. The specific charges listed infliction of corporal punishment, application of physical restraint, failure to prepare lesson plans, and writing a letter to the newspaper concerning student abuse of teachers. The board policy stated.

> It is the teacher's right and duty to discipline. The teacher may use corporal punishment for purposes of restraining and correcting pupils the same as a parent or guardian. Corporal punishment must be reasonable in manner and moderate in degree.[219]

The Teacher Handbook and the administrator's instructions directed that corporal punishment was not to be used.

Although a hearing panel found for the teacher, the board followed the administrator's dismissal recommendation. The court held that the evidence was insufficient to support the charges since the teacher had followed directions regarding the lesson plans and the one documented incident involving corporal punishment occurred three years before charges were filed.

Most often, the courts sustain the dismissal of teachers who use corporal punishment in defiance of administrative directives.[220] *Jerry v. Board of*

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216 Nordstrom v Hansford, 164 Colo 398, 435 P 2d 397 (1967)
217 *Id* at 403, 435 P 2d at 397
218 Clayton v Board of Educ , 49 App Div 2d 343, 375 N Y S 2d 169 (1975)
219. *Id* at 346, 375 N Y S 2d at 173
220. *See e.g* Barnes v Fair Dismissal Bd , 548 P 2d 988 (Ore App 1976); Carpenter v City of Greenfield School Dist No 6, 358 F Supp 220 (E D. Wisc 1973). Board of Educ., Mt Vernon Schools v Shank, 548 S W 2d 554 (Mo 1976)

Education of Syracuse[221] is a recent illustrative case. The principal had repeatedly warned a physical education teacher to keep his hands off his pupils. A hearing panel ruled that the evidence was not sufficient to justify dismissal. The board elected not to follow the panel's recommendation. The following testimony convinced the court that the board's action was warranted:

> [His acts included] . . . striking children with dodge balls, soccer balls, hands and fists, throwing or pushing children against walls and floors so as to strike their heads and knees, the pulling of hair . . . and the pulling of a child by the ear. Some children cried and shook with fear and sought to stay in their home room.[222]

Elementary school students testified that he called them "dummies, damn babies, big babies, stupid bastards, little shitheads" and used such other terms as "the f-word, Jesus Christ, bitch. . . ."[223]

Personal Appearance

Hairstyles and modes of dress changed rapidly during the past decade. For various reasons school boards and school officials resisted the adoption of the new styles by both students and faculty. Many boards adopted policies, regulations, or codes specifying acceptable personal appearance. On occasion, an insubordination charge is made solely because the teacher refuses to comply with an order to change his appearance.

In *Lucia v. Duggan*, the teacher was ordered reinstated in his position after he was dismissed for ignoring an order to remove a beard he grew during a vacation period.[224] The decision was based not on his right to grow a beard but on procedural grounds including the board's failure to notify him of charges or of the consequences of refusing to shave and its failure to have a written and announced policy on the wearing of facial hair.

In Florida a federal district court held that the school board's failure to reappoint the only black teacher on the school faculty because he disobeyed an order to shave his goatee was arbitrary, discriminatory, and racially motivated.[225] Therefore, the order of the board was nullified. The court cited *Finot v. Pasadena City Board of Education*, in which the wearing of a beard by a teacher was held to be constitutionally protected under the due process clause of the Fourteenth Amendment.[226]

Also, in *Ramsey v. Hopkins* the court declared a principal's rule barring mustaches was in violation of a teacher's right to due process and equal protection of the laws.[227] The court noted that "personal tastes of administrative

221 50 App Div. 2d 149, 376 N Y S 2d 737 (1975) *See also* Thompson v Wake Cty Bd. of Educ . 230 S E 2d 164 (N C App 1976)
222. *Id.* at 156, 376 N.Y S 2d at 744
223. *Id.* at 157, 376 N Y S 2d at 745
224. 303 F. Supp 112 (D Mass 1969)
225. Braxton v Board of Pub. Instr of Duval Cty . 303 F Supp 477 (M.D Fla. 1969).
226. *Id* at 959
227 320 F. Supp 497 (N D Ala 1970)

officials is [sic] not a permissible base upon which to base rules for the organization of public institutions."[228] Because the teacher's position had already been filled, the court ordered that he be offered another position in the system.

Teachers continue to challenge school board attempts to regulate their personal appearance. A superintendent ordered a teacher to shave off his beard before the school term began.[229] The teacher refused to do so unless his appearance proved disruptive. No rule against beards existed, and other teachers had appeared in school wearing beards and mustaches without causing disruption. After he had worn the beard to class, the school board dismissed him for insubordination. The Texas Civil Court of Appeals ruled that the contract had been illegally terminated and awarded the teacher the remainder of his salary plus interest from February 19, 1970, to November 12, 1975.

Dismissal actions have been upheld when the board had a written policy regulating dress and grooming. For example, the Tennessee Supreme Court upheld the discharge of a teacher who refused to shave. The board regulation said, in part, "No apparel, dress, or grooming that is or may become potentially disruptive of the classroom atmosphere or educational process will be permitted."[230]

The Supreme Court has also ruled recently on the constitutionality of a grooming regulation in *Kelly v. Johnson*.[231] The regulation, applicable to male police officers, "was directed at style and length of hair, sideburns, and mustaches . . . beards and goatees were prohibited, except for medical purposes. . . ."[232] Justice Rehnquist's majority opinion indicated that the enactment of the regulation was not so irrational that it could be considered a deprivation of the officer's "liberty" interest in freedom to choose his hairstyle.

For those who might want to make sweeping generalizations from this decision, it is well to remember the Court's cautions. The opinion warned that the regulation should not be viewed in isolation but "in the context of the county's chosen mode of organization for its police force."[233]

> When the state has an interest in regulating one's personal appearance . . . .there must be a weighing of the degree of infringement of the individual's liberty interest against the need for the regulation.

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228. *Id.* at 489
229. Ball v. Kerrville Indep. School Dist., 529 S.W 2d 792 (Tex. Civ App. 1975). *See also* Handler v. San Jacinto Junior College, 519 F.2d 273 (5th Cir. 1975), *rehearing denied and rehearing en banc denied*, 522 F 2d 204 (1975). *See also* East Hartford Educ. Ass'n v. Board of Educ., 405 F. Supp. 94 (D Conn 1975) also upholding a school district's dress code.
230. Morrison v. Hamilton Cty Bd of Educ , 494 S W 2d 770., 771 (Tenn. 1973)
231. 96 S. Ct 1440 (1976).
232. *Id.* at 1442
233. *Id.* at 1445
234 *Id* at 1447

This process of analysis justifies the application of a reasonable regulation to a uniformed police force that would be an impermissible intrusion upon liberty in a different context.

Protest

Teachers who speak out publicly on various issues may incur the displeasure of their employers. Frequently, when such expressions are criticisms of the board, administrators, or some aspect of school operation, punitive action results, usually in the form of dismissal for insubordination. Such dismissals may result, too, from the teacher's protesting such things as national policy or social injustice. In either situation, the teacher disciplined for such activities may be able to establish that First Amendment rights were violated.

The United States Supreme Court ruling in the 1968 *Pickering* case gave great impetus to removal of unwarranted restrictions on the teacher's freedom of speech and expression [235] The case resulted from the dismissal of a teacher who wrote a letter to the local newspaper criticizing the administration's handling of past proposals to raise school revenue and its allocation of resources between the athletic and the educational programs of the school. The Court said, in fact, that the teacher's right to speak out on issues of public concern should not serve as a basis for his discharge

Following this ruling, the court of appeals of New York reversed its earlier decision upholding a teacher's dismissal.[236] In this instance the teacher addressed a letter to the teachers and the administration of the district criticizing the school board's failure to renew the contract of a probationary teacher. This letter, written without the consent of the probationary teacher, contained some factual inaccuracies, yet the court held that the communication had no deleterious effects within the school system and was insufficient to sanction disciplinary action

Later cases began to define the limitations on the exercise of these constitutional rights Although a critical letter was again the source of the dispute in *Watts v Seward School Board*, the Alaska Supreme Court affirmed the dismissal of the teachers involved.[237] The court based its decision on the following facts that, in its opinion, distinguished this case from *Pickering*: (1) the criticisms in the letter were directed toward a person (the superintendent), (2) the statements were in the nature of grievances, (3) the false statements reflected on the integrity and professional ability of the

235 Pickering v Board of Educ of Twp High School Dist No 205, 391 U S 563 (1968) See S Miller, *Teacher Freedom of Expression Outside the Classroom An Application of Pickering and Tinker*, 8 Ga L Rev 900-918 (1974)

236 Puentes v Board of Educ , 24 N Y 2d 996, 302 N Y S 2d 824, 250 N E 2d 232 (1969)

237 454 P 2d 732 (Alas 1969), *cert denied*, 398 U S 928 (1970)

superintendent and concerned the day-to-day operation of the school, and (4) the open letter was a source of community controversy.[238]

Even though elements of protected free speech may be involved, there may be other legitimate reasons for the nonrenewal or termination of the teacher's contract. A Massachusetts teacher claimed that the dismissal was in reprisal for a letter he had written to the newspaper criticizing the principal's proposal for using federal funds.[239] Testimony revealed, however, that the administration had informed him prior to the publication of the letter that his retention was tenuous.

Similarly, the federal district court in Connecticut held a teacher's refusal to report to the principal's office as directed sufficiently justified the termination of her contract.[240] The teacher's contention that her First Amendment rights were violated developed after she defied a board regulation prohibiting the distribution of certain types of printed materials. The court held that the regulation was not constitutionally overbroad. The record showed that the school situation was extremely tense and that the materials distributed by the teacher included leaflets from the Revolutionary Youth Movement, a press release from the United States Labor Party sharply critical of school programs and employees, and another leaflet urging students to "smash" the work study programs.[241]

The judicial attitudes toward oral communication appear to fall into a pattern similar to those established toward written communication. An Indiana school board charged that one of its teachers "exhibited a general attitude which discloses a refusal to cooperate with school authorities on matters related to school administration."[242] This charge stemmed from the refusal of the teacher, a member of a negotiating team, to retract a statement made at a meeting of the teachers' association. The statement said, in part, that "the school administration was trying to buy the teachers off with little items at the expense of big ones."[243] Since there were no other charges, the district court held that the dismissal, based solely on such statements, was unjustified and constitutionally impermissible.

As in written communication, obvious personal attacks are viewed differently by the courts. In Connecticut a teacher failed to win a contract renewal.[244] Dissatisfaction with his teaching assignment prompted him, in an open meeting on school problems, to label the director of secondary education a liar and to question the integrity and honesty of the entire administrative staff. His statements were expressed after the meeting's

238 *Id.* at 733-739
239. Gorham v Hewett, 392 F Supp 22 (D Mass 1975)
240. Gulbertson v McAlister, 403 F Supp 1 (D. Conn 1975).
241 *Id.* at 3.
242. Roberts v Lake Central School Corp., 317 F. Supp. 63, 64 (N D Ind. 1970).
243 *Id.* at 63
244 Jones v. Battles, 315 F Supp 601 (D Conn 1970)

guidelines were read, which stipulated there should be no mention of personalities in the remarks to be made. In his opinion, Judge Clarie declared:

> The plaintiff's abusive language directed toward his superiors was of such a nature as to destroy any likelihood of a future professional relationship between him and the administrative staff.
>
> The plaintiff's reckless, unsupportive, and subjective accusations plant the seeds of disruptive dissention among the many. The standards of professional conduct exhibited of a public school teacher must never be lowered to the level of name-calling and abuse under the guise of protected free speech.[245]

The court found that the conduct of the teacher transgressed the protective limits afforded him under the law.

In *Ahern v. Board of Education of Grandview*, the courts rejected a Nebraska teacher's requests for injunctive relief under the Civil Rights Act.[246] The teacher's unorthodox teaching style and her outspokenness resulted in warnings by the school administration. The incident leading to her discharge occurred when she returned to duty after an absence and reacted to a report about problems between a substitute teacher and her students. The plaintiff said to her class, "That bitch! I hope that if this happens again . . . all of you walk out."[247] One of these problems, a slapping incident, was role-played in her other classes. The teacher encouraged her students to develop a proposal for a school regulation regarding corporal punishment. In regard to the teacher's statements in the classroom, the court said:

> I am persuaded that the exercising of a constitutional right was not the reason for the discharge. Although a teacher has a right to express opinions and concerns, as does any other citizen on matters of public concern, by virtue of the First and Fourteenth Amendments, . . . I doubt that she has the right to express them *during* class in deliberate violation of a superior's admonition not to do so, when the subject of her opinions and concerns is directly related to student and teacher discipline.[248]

The courts have consistently held that First Amendment protections extend to nonverbal expression. For the most part, the decisions on student rights in this area antedated those dealing with teacher rights.[249] A New York teacher's contract was not renewed because she would not salute the flag and

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245. *Id.* at 607.

246. 327 F. Supp. 1391 (D. Nebr. 1971). *See* N. Miller, *Teacher Freedom of Expression Within the Classroom*, 8 Ga. L. Rev. 837-897 (1974).

247. *Id.* at 1393.

248. *Id.* at 1397.

249. *See e.g.* McCollum v. Board of Educ., 333 U.S. 203 (1948) and Tinker v. Des Moines Indep. Commun. School Dist., 393 U.S. 503 (1969).

say the pledge of allegiance in her class as required by state law.[250] Her refusal stemmed from an objection to the words "liberty and justice for all." She did not act disrespectfully toward the flag nor encourage her pupils to follow her example. The Second Circuit Court held that the teacher's expressions of protest were indeed protected from encroachment by the First Amendment.

On the other hand, a federal district court deemed a New York teacher's refusal to affirm her support of the federal and state constitutions as not being protected by the First Amendment.[251] The teacher, a member of the Quaker sect, claimed that her religious beliefs did not permit her to comply with the statutory requirements. The court differentiated between an "absolute" freedom of belief and a "conditional" freedom of action.[252] The state, according to the opinion, had shown the required compelling interest to justify infringement on this conditional right. The state's interest was in the teacher's influence on children.

A final case involving teacher protest was reported in its early stage in the previous monograph.[253] At that time the New York commissioner of education had upheld the dismissal of a probationary teacher for his refusal to comply with the school board's directive not to wear a black armband to protest the Vietnam War. By 1974, his appeal reached the federal district court.[254] The court recognized that the actions of the teacher were constitutionally protected. Since the board could not show that any disruption whatsoever resulted, the court overturned the dismissal and awarded damages in the form of back pay and attorney's fees.

Curricular Decisions

Does First Amendment protection extend to the teacher's choice of instructional materials? As demonstrated by the cases that follow, public school teachers are asserting a constitutional right to academic freedom. The insubordination charge arises when the teacher is ordered to stop using the materials in question, but refuses to do so.

This situation arose in Massachusetts when a teacher was suspended for assigning, after she was asked not to do so, an article in the *Atlantic Monthly* (student edition) that contained a vulgar term the board of education found offensive.[255] The court directed the reinstatement of the teacher after

250. Russo v. Central School Dist. No 1, 469 F.2d 623 (2d Cir 1972).
251. Biklen v Syracuse Bd of Educ., 333 F. Supp 902 (N.D.N.Y. 1971)
252. *Id.* at 904.
253. Appeal of James, 10 Ed. Dept. Rep. ____, N Y Comm'r Dec. No. 8195 (1970)
254. James v. Board of Educ. of Cent. School Dist. No 1, 385 F. Supp. 211 (W.D.N.Y 1974).
255. Keefe v. Geanakos, 418 F 2d 359 (1st Cir. 1969). The court referred to the word as "a strong expression for an incestuous son"

reviewing the article, affirming its literary merits, and noting the use of the offending word in other works in the school library.

The facts were quite similar in *Parducci v. Rutland*.[256] In this instance the assignment was a short story by Vonnegut entitled "Welcome to the Monkey House." The principal and the associate superintendent objected to use of the story because in their opinion it advocated "killing off elderly people and free sex."[257] They asked the teacher to discontinue using the story; the teacher declined and was dismissed. In considering the constitutional issues raised, Chief Judge Johnson said:

> Although academic freedom is not one of the enumerated rights of the first amendment, the Supreme Court has on numerous occasions emphasized that the right to teach, to inquire, to evaluate and study is fundamental to a democratic society. . . .
>
> The right to academic freedom, however, like all other constitutional rights, is not absolute and must be balanced against the competing interests of society. The court is keenly aware of the state's vital interest in protecting the impressionable minds of its young people from any form of propagandism in the classroom.[258]

In ordering reinstatement of the teacher, the court considered other factors: (1) the administrators' lack of expertise in the study of literature, (2) the absence of a written or announced policy on selection of instructional materials, and (3) the inclusion of other works with equally controversial language and philosophy on the school's English department reading list.

The forbidden publication in a 1976 case was *Catcher in the Rye*.[259] After parental objections, the superintendent and principal talked to the teacher and secured his agreement not to use the book. Later, however, the teacher allegedly restored it to the curriculum. The board dismissed the teacher for insubordination based on this charge and another charge that he walked out of conference with the principal and refused to return. In formulating its opinion the court observed:

> Balancing the rights and advantages of academic freedom versus some measure of effective control over the contents of a curriculum presents an enormously difficult problem to individual teachers and administrators in modern schools as indeed to the courts, particularly when an obscenity factor is involved.[260]

The court went on to analyze the book in question.

> As English is perceived today, the novel is well written, but as is customary in popular best sellers it has a chapter or two dealing with

256. 316 F Supp 352 (M D Ala 1970)
257. *Id.* at 353.
258. *Id* at 355.
259 Harris v Mechanicville Cent School Dist . ___ Misc 2d ___, 382 N Y.S 2d 251 (1976)
260 *Id.* at ___, 382 N Y S 2d 253

its youthful protagonist's groping, fumbling "sex life" and, horrible to contemplate, the author indulges several times in a well-known common vulgarity, the use of the word "f--k." This ancient anglo-saxon four-letter obscenity is one not unknown outside the classroom to high school students and their juniors. . . . It is difficult to imagine how the presence in the school curriculum of a book containing such language could possibly have any serious independent impact on the morals and behavior of the students or the orderly administration of the school.[261]

Although the court's *dicta* makes interesting reading, it relates only indirectly to the rationale for overturning the dismissal—a violation of substantive due process. As in the previously mentioned cases, there were no board policies or directives concerning the teaching of the subject matter in question, nor was there testimony of witnesses establishing that the teacher had failed to follow the agreement with the administrators on its use. The court indicated that the matter of disciplining the teacher should be returned to the board to consider some penalty provided by law short of dismissal.

Not all disputes over choice of subject matter involve the allegation that the materials are obscene. An Arkansas teacher's dismissal for insubordination resulted from her choice of topics for the "Think and Do" exercises of her elementary school class.[262] The pupils, for example, drew pictures illustrating their feelings concerning an inoperative drinking fountain and wrote letters to the school cafeteria director asking why raw rather than cooked carrots could not be served, pointing out their greater nutritional value. The federal district court held that the nonrenewal of the teacher's contract violated her substantive due process rights. Likewise, the Fifth Circuit Court ordered reinstatement and sustained the award of damages to a Texas teacher dismissed for insubordination because he included a unit on race relations and the Vietnam War in his twelfth-grade civics and political science classes.[263]

Both nonrenewal and termination actions have received judicial approval when the school exercised its statutory right to determine the curriculum in advance of any offense. For example, in a Missouri case, *Saunders v. Reorganized School District No. 2*,[264] the state supreme court upheld the dismissal of a teacher who would not use the prescribed course of study. Also, a Florida teacher was unsuccessful in his efforts to have the court order his contract renewed. The teacher had rejected the board's stipulation that as a condition to his reemployment he stop using the classroom to attack the

261. *Id.* at ____, 382 N.Y.S.2d 256.
262. Downs v Conway School Dist., 328 F Supp. 338 (E.O. Ark. 1971).
263. Sterzing v. Fort Bend Indep School Dist., 496 F.2d 92 (5th Cir. 1974).
264. 520 S.W.2d 29 (Mo. 1975)

administration and to discuss his personal experiences with prostitutes, masturbation, and homosexuals.[265]

Finally, academic freedom and First Amendment rights in the choice of course content will not protect the job status of teachers who may legally be dismissed for other reasons. Teachers who alleged that their contracts were not renewed because of such activities as playing records of *Hair* and *Alice's Restaurant* and discussing Vietnam, political mottos, drugs, and hippies failed to prove that this was the real reason.[266] The Tenth Circuit Court found that the evidence supported the board's list of charges that included insubordination and causing disharmony among the faculty.

Employer/Employee Conflicts

Disputes between teachers and boards of education may develop over a variety of issues not previously discussed. When such disputes lead to the employee's defiance of school board policy or to the employee's interference with school operations, the board may legitimately dismiss the employee for insubordination.

A teacher new to the Idaho school district failed to sign and return the written contract tendered to him and to present a valid teaching credential for registration by school officials.[267] He continued to ignore this requirement even after he was advised that he could not be paid until he complied. The court recognized both the power and the duty of the board to terminate the teacher's employment.

After several unsuccessful attempts to get a Minnesota high school teacher to fill out certain forms used in evaluating the foreign language and social studies departments, the board dismissed him for insubordination.[268] The state supreme court upheld the dismissal as a reasonable and constitutionally acceptable exercise of the board's discretion.

A Louisiana board of education dismissed a teacher for insubordination because she refused to comply with a newly instituted policy requiring physical examinations.[269] The policy specified that each teacher was to have the examination annually by a physician of her choice and that the examining physician was to send the board his appraisal of the teacher's fitness to carry out the teaching assignment. The appellate court upheld the action of the board.

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265 Moore v. The School Bd. of Gulf Cty., 364 F. Supp. 355 (N.D. Fla. 1973) *See also* Bowles v. Robbins, 359 F. Supp. 249 (D. Vt. 1973)

266 Adams v. Campbell Cty. School Dist., 511 F. 2d 1242 (10th Cir. 1975) *See also* Powers v. Marcos School Dist. R.E. 6, Montezuma Cty., 391 F. Supp. 322 (D. Colo. 1975) This decision was affirmed 539 F. 2d 38 (10th Cir. 1976)

267 Heine v. School Dist. No. 271, 95 Idaho 85, 481 P. 2d 311 (1971)

268 Ray v. Minneapolis Bd. of Educ., 202 N.W. 2d 375 (Minn. 1972)

269 Pitcher v. Iberia Parish School Bd., 280 So. 2d 603 (La. App. 1973)

In 1973 the Second Circuit Court upheld an insubordination dismissal, saying:

> A school system may justifiably demand more from its teachers than competent classroom instruction. A chronic refusal to comply with reasonable administrative obligations can surely have a disruptive effect on students, fellow teachers and administrators alike and consequently poses a threat to an optimum learning environment.[270]

The teacher's violations of administrative rules included being late to class, failing to supervise classes, and failing to prepare course outlines. The teacher also read to her students a reprimand she had received from the principal.

In a 1975 civil rights suit, a black Arkansas coach contended that the reason for his dismissal was his civil rights activities rather than insubordination as charged.[271] The board was able to refute this claim by showing that after he had moved up through the system to the position of head coach, he deliberately ignored the administrator's directive not to play a student declared ineligible for regularly scheduled games. Although the student was declared ineligible for the tournament, the coach listed the name on the roster; then he played another student under [redacted] name. The court concluded that the evidence sufficiently justified the [redacted]'s action.

Another Arkansas coach became uncooperative after he was passed over for the athletic director's position. As conditions continued to deteriorate, the board chose not to renew his contract. The court described the situation thusly:

> It is a sad story. But it is the type of problem that confronts school boards, unfortunately on not infrequent occasions—the type that totally involves the entire school community. This particular school community has finally resolved the problem. It cannot be said that it did so in an unfair or arbitrary manner. The matter should therefore remain at rest.[272]

The court held that no constitutional rights were infringed, but it did observe that "[n]o adequate and comprehensive rationale has yet been enunciated by the Supreme Court in this type of case."[273] According to the opinion, "there was substantial evidence from which the board could find that he was insubordinate."[274]

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270. Simard v. Board of Educ. of Town of Groton, 473 F 2d 988, 995 (2d Cir 1973). *See also* Caldwell v Ecorse Bd. of Educ., 17 Mich. App. 632, 276 N.W.2d 277 (1969); Calvin v. Rupp, 332 F Supp. 358 (E.D Mo. 1971).

271. Cato v. Collins, 394 F Supp 629 (E.D. Ark. 1975).

272. Williams v. Day, 412 F. Supp. 336, 348 (E D. Ark 1976).

273. *Id.* at 346. *See* Bishop v Wood, *infra* note 278 in which the Supreme Court did consider this type of case.

274. *Id* at 348. *See also* Cullahan v. Price, 513 F.2d 51 (5th Cir 1975); Petersburg Educ. Ass'n v Petersburg School Dist. No. 14, 543 P 2d 35 (Ore. App. 1975). Rumora v Board of Educ. of Ashtabula, 43 Ohio Misc. 48, 335 N E 2d 378 (Ohio Ct. App 1975)

The next example concerned the nonrenewal of the contracts of two teachers whose views conflicted with the school's administration.[275] One teacher claimed that the nonrenewal came in response to her appearance on a radio show to discuss the board's dress code policy, while the other maintained that her release resulted from the encouragement she gave students in publishing an underground newspaper. The superintendent listed insubordination as one of the reasons for recommending dismissal. In the civil rights action that followed, the federal district court held for the board. However, the Tenth Circuit Court ruled that the evidence sufficiently supported the latter teacher's claim. The decision was vacated in part and remanded for further proceedings.

In another of the many § 1983 actions, a special education teacher instituted a suit against the superintendent and members of the board alleging that her due process and First Amendment rights had been infringed.[276] The teacher had become involved in an effort to assist a pregnant student and had advised the girl of her right to an abortion. Subsequently, the girl became a ward of the state. A dispute arose when the welfare department decided against an abortion, and the teacher objected. Although these activities represented part of the reason for the board decision not to renew the teacher contract, the district court ruled that the activities exceeded protected free speech. Affirming the district court decision, the Tenth Circuit Court said, "Personality differences or difficulty in getting along with others are simply not the kind of accusations which warrant a hearing."[277]

Finally, the United States Supreme Court did hear this type of case involving the contested dismissal of a public employee.[278] A police officer in North Carolina was privately told that the reasons for his dismissal were failure to follow orders, poor attendance at police training classes, causing low morale, and conduct unsuited to an officer. The employee argued that these reasons were false. Relying on its *Roth* decision, the Court declared: "Even so the reasons stated to him in private had no different impact on his reputation than if they had been true."[279] Thus, there was no "liberty" violation. The Court went on to say:

> The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. We must accept the harsh fact that numerous individual mistakes are inevitable in the day to day administration of our affairs. The United States Constitution cannot feasibly be construed to require federal judicial review for every such error.[280]

275 Bertot v. School Dist. No. 1, Albany Cty., 522 F. 2d 1171 (10th Cir. 1975), *rehearing denied*

276 Gray v. Union Cty. Intermediate Educ. Dist., 520 F. 2d 803 (9th Cir. 1975)

277 *Id.* at 806

278 Bishop v. Wood, 96 S. Ct. 2074 (1976)

279 *Id.* at 2080

280 *Id.*

By a five-four decision, the Court affirmed the dismissal.

Unprofessional Conduct

"Unprofessional conduct" or "conduct unbecoming a teacher" is the most nebulous ground for dismissal considered thus far because there are no absolute standards of teacher conduct.[281] Many of the situations are similar to those resulting in dismissals for insubordination with an important difference—the alleged misconduct of the teacher does not usually violate a board's policy or an administrator's directive. While the charge is often coupled with other stated grounds for the dismissal, it is occasionally the single justification used.

The choice of teaching methods and materials to which the school's administration objects may result in charges of unprofessional conduct. Academic freedom questions were raised in *Mailloux v. Kiley*.[282] This case was sparked by the dismissal of an English teacher for conduct unbecoming a teacher. The specific incident was the teacher's writing on the chalkboard, in connection with an incidental discussion of social taboos, the familiar, four-letter slang word for sexual intercourse. In response to the teacher's assertion that he was deprived of his rights under the First Amendment, Judge Wyzanski noted that the question whether the Constitution gives any right to use a particular teaching method or leaves the decision to the school authorities is undecided. He based his order for the teacher's reinstatement on the absence of a school board policy prohibiting the particular teaching method used. A three-judge court affirmed the decision.

A California teacher was unsuccessful in getting the court to overturn the nonrenewal of his contract.[283] At the urging of his students, the teacher had read to his English class an original short story. This story about the funeral of a young black man contained the expression "white-mother-fuckin-pig." The appellate court affirmed the decisions of the trial court denying the teacher's petition. The court noted:

> A teacher in a public school district is regarded by the public and pupils in the light of an exemplar whose words and actions are likely to be followed by children coming under his care and protection.[284]

The use of coarse and vulgar language without legitimate professional purpose, according to the opinion, did not have constitutional protection.

The court saw no academic or professional purpose served by the punishment assessed by a tenured Louisiana teacher.[285] He required that two girls

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281 The statutes of only one state distinguish between "conduct unbecoming a teacher" and "unprofessional conduct."

282 323 F. Supp. 1387 (D. Mass. 1971).

283 Lindros v. Governing Bd., 26 Cal. App. 3d 495, 103 Cal. Rptr. 188 (1972).

284 *Id.* at 499, 103 Cal. Rptr. at 193.

285 Celestine v. Lafayette Parish School Bd., 284 So. 2d 650 (La. App. 1973).

in his class write a vulgar four-letter word on the blackboard one thousand times for having said the word aloud. The court held that the board had not abused its discretion in dismissing the teacher.

In a complicated 1976 case, the Seventh Circuit Court reversed and remanded a federal district court's decision enjoining a teacher's discharge for unprofessional conduct.[286] The teacher had requested the injunction when told by his superintendent that he might be subject to discharge for using an instrument called the "Human Sexual Awareness Inventory" in his "Contemporary Living" class. The record described the instrument, which the teacher developed in connection with his teaching duties in military service. The inventory consisted of four parts. Part I contained line drawings of male and female figures with directions requiring the sexual parts to be matched with their proper names; Part II also used the line drawings but required matching with "street" names; Part III included forty true-false items, for example, "Virginity in women is an important factor in determining success in marriage"; and Part IV was made up of twenty items, such as "Engaging in sexual relations with more than one person at a time (group sex) is alright," to which the students were to respond on a five point agreement/disagreement scale.

An Iowa teacher successfully challenged her dismissal for permitting objectionable language in a class play that she directed. In attempting to comply with initial objections, the teacher had altered the original script. The court described the legal status of academic freedom of high school teachers as "the substantive right of a teacher to choose a teaching method which in the court's view served a demonstrated educational purpose, and the procedural right of a teacher not to be discharged for the use of a teaching method which was not prescribed by regulation."[287]

Protest activities sometimes lead to unprofessional conduct dismissals. Six Boston teachers were dismissed for conduct unbecoming a teacher, and their dismissals were affirmed by the courts.[288] The school at which the teachers taught was the focal point of a controversy concerning the extent of direct community participation, or control, that should be exercised or permitted in the schools. On the first day of school a demonstration took place in which several persons entered the school and disrupted the classes. On the following day, after being barred from the building by the police, the

286 Fern v. Thorp Public School Dist., 532 F 2d 1120 (7th Cir. 1976).

287 Webb v. Lake Mills Commun. School Dist., 344 F. Supp. 791 (N.D. Iowa 1972). *See also* Brubaker v. Board of Educ., 502 F 2d 973 (7th Cir. 1974) in which the court upheld the dismissal of eighth-grade teachers for using a poem describing the pleasures and benefits of drug use and illicit sex, and Board of Trustees of Clark Cty. School Dist. v. Rathbun, 556 P.2d 548 (Nev. 1976) in which the court overturned the nonrenewal of a teacher's contract on First Amendment grounds.

288 DeCanio v. School Comm. of Boston, 260 N.E. 2d 676 (Mass. 1970), *appeal dismissed*, 410 U.S. 929 (1971).

demonstrators went to the playground where the children were being assembled and announced that there would be no school that day. The offense began at this point:

> The six plaintiffs without informing, consulting with, or obtaining the consent of superiors at the school accompanied the demonstrators and children to Shaw House (described as a liberation school) and conducted their classes there for the entire day.[289]

The next day the teachers were suspended and later dismissed.

The Eighth Circuit Court upheld the dismissal of a mathematics teacher whose in- and out-of-class protests exceeded the bounds of protected free speech.[290] The decision affirmed the district court's ruling that the teacher's actions and suggestions that the students get the R.O.T.C. recruiters off campus disrupted the school and interfered with its operation. The board had offered the teacher a hearing, which he refused to attend.

Teachers may face discharge for unprofessional conduct because of their supervision of their own children. A Nevada teacher's contract was not renewed because he permitted and even encouraged his daughters not to attend school. The court upheld the dismissal and noted that a teacher's right to teach could not solely depend on his conduct in the classroom.[291]

In *Cook v. Hudson*,[292] the nonrenewal resulted from the teachers' sending their own children to a private segregated school. The school board argued that the teachers would be less effective because their students would feel a sense of inferiority. On the other hand, the teachers claimed that the action violated their constitutional right of association. The federal district court sustained the board's action, and the Fifth Circuit Court affirmed. The United States Supreme Court heard arguments but dismissed the appeals because of its June 24, 1976, decision prohibiting private schools from rejecting applicants on the basis of race.[293] Justice Burger did point out, "Few familial decisions are as immune from governmental interference as parents' choice of a school for their children, so long as the school chosen otherwise meets the educational standards imposed by the state."[294]

One of the most unusual cases in this area was a § 1983 action by a teacher against a county court judge.[295] The teacher appeared before the judge on a charge of driving without a license. Prior to the hearing the judge learned of

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289. *Id.* at 678
290. Birdwell v. Hazelwood School Dist., 491 F 2d 490 (8th Cir 1974)
291. Meinhold v Clark Cty School Dist., 89 Nev 71, 506 P 2d 420 (1973)
292. 511 F.2d 744 (5th Cir 1975)
293. Cook v. Hudson, 511 F 2d 744 (1975), *cert granted* March 1, 1976, 96 S Ct 1408. The appeal was dismissed in December. *See Attendance Law for Teachers' Kids No Longer an Issue, Says High Court*, 4 SCHOOL LAW NEWS 10 December 10, 1976
294. *Id*
295. McGlasker v Calton, 397 F Supp 525 (N D Ala 1975)

other violations including two speeding tickets, improper license plates, and failure to appear in court. At the hearing the judge directed that the defendant be jailed. Next day the judge informed him that as a school teacher he was setting a bad example and offered to drop the charges if the teacher would resign, pay his debts to lending agencies in the community, and leave the county. The court ruled that judicial immunity protected the judge. His directives to the teacher were "at worst no more than acts in excess of jurisdiction."[296]

Unfitness to Teach

The specific charge in a number of recent dismissal actions has been "unfitness" to teach. Conduct that provides sufficient evidence of the teacher's unfitness is generally serious enough to justify revoking the certificate as well as terminating the employment contract.

Missing school for a pleasure trip to Jamaica (although permission was denied) did not establish the teacher's unfitness to teach. However, the court did sustain the dismissal on another charge; that is, her "services were unprofitable" to the school.[297] The teacher belatedly claimed that the matter should have been submitted to arbitration, but the court noted the untimeliness of this claim.

A Michigan appellate court held that the board failed to sustain its burden of proof that a tenured teacher was unfit.[298] Testimony established that her students' achievement level was equal to that of their peers. The court said: "We . . . intend to require discharges of tenured faculty based on curriculum policy to be rationally and specifically related to a detrimental effect on the school and its students."[299]

While inadvertently bringing a gun and ammunition into the classroom may represent a "grave lack of judgment," it does not, observed the court, evidence "unfitness to teach."[300] The teacher, a licensed gunsmith, had not realized the articles were in the pockets of a ski jacket he wore to school. Twelve years of satisfactory service could not be justifiably terminated because of this one incident.

Behavior of a more serious nature such as a felony conviction may represent sufficient grounds for dismissal. A California teacher was discharged under a state statute authorizing dismissal on "conviction of a felony or any crime involving moral turpitude."[301] The teacher pled guilty to possession of marijuana and was sentenced to two years' probation. Following successful

296. *Id* at 527
297. Fernald v City of Ellworth Superintending School Comm , 342 A 2d 704 (Me 1975)
298. Beebee v Haslett Public Schools, 66 Mich App 718, 239 N W 2d 724 (1976)
299. *Id* at 730
300. Wright v Superintending School Comm , 331 A 2d 640 (Me 1975)
301. Governing Bd of Realto Unified School Dist v Mann, 54 Cal Rptr 607 (1976)

completion of probation, the criminal court declared the offense to be a misdemeanor. However, the appellate court affirmed the dismissal of the teacher based on the original conviction.

In a somewhat similar New Mexico case, a beginning teacher appealed her dismissal.[302] The school board dismissed her after learning that while a university student she plead guilty to the charge of unlawful distribution of marijuana and was currently on one-year probation. The teacher first appealed the dismissal to the state board, which heard new evidence and affirmed the local board's action.

The complicating factor in this case was the state's Criminal Offender Employment Act (COEA) that provides only two grounds for dismissal: (1) that the employee had not been rehabilitated and (2) that the conviction related adversely to the position. The state supreme court ruled the state board had sufficient evidence to conclude that the teacher had not been rehabilitated. The probation officer testified that the teacher became angry when she was not permitted to see her file and made derogatory comments about the laws and "narcs." When a student had asked the teacher about using drugs, she told him "he could get in some trouble because of some bad laws, but for him to do what he wanted."[303] The board was not estopped from dismissing the teacher because the offense occurred before the teacher was hired.

A Florida teacher was arrested, tried for first degree murder, and acquitted by reason of temporary insanity. He was then committed to a mental hospital for a brief period of time. Upon release the teacher requested reinstatement and restoration of tenure status, which the board had approved with more than one year of the probationary period remaining. The board refused, and the teacher sought judicial relief. The court concluded that the board was not estopped from denying tenure since failure to complete the probationary period was caused by the employee's own conduct.[304]

A Michigan case developed from an unusual set of facts.[305] The school board offered a contract to an applicant at midyear. He began teaching prior to taking a "pre-employment physical examination" required by a provision of the collective bargaining agreement. Although the teacher's application listed his health as excellent, the examining physician's report indicated "internal disorders caused by nerves" and that the "condition could worsen with attacks lasting two or three days several times a year." According to the report, the nervous disorders were due to the teacher's

302. Bertrand v New Mexico State Bd. of Educ., 88 N.M. 611, 544 P.2d 1176 (1975).
303. *Id.* at 614, 544 P.2d 1179.
304. Williams v. Board of Pub. Instr. of Dade Cty., 311 So. 2d 812 (Fla. App. 1975).
305. Ferndale Educ. Ass'n v. School Dist. for City of Ferndale, 67 Mich. App. 645, N.W.2d 481 (1976).

homosexuality. After receiving the report, the board notified the teacher that his employment was terminated.

The teacher challenged his release, and the matter was submitted to arbitration. The board contended that the teacher had never become an employee of the district and therefore it need not give him a hearing. The teacher argued that the physician's report was inaccurate and that he was entitled to be heard. The arbitrator decided that the teacher was an employee and that he in fact was entitled to a hearing. The board decided to ignore the arbitrator's decision, and the teacher appealed. The trial court held for the board, and the teacher again appealed. The appellate court reversed, indicating that "the potentially great harm of the allegations of homosexuality and the resultant dismissal require that he be given opportunity to refute them."[308]

Immorality

Articles by Punke and Koenig stress the variety of behaviors leading to charges of immorality.[307] When used as a basis for dismissal, the term formerly encompassed almost any conduct that is offensive to the standards of the community. Two cases considered in the preceding sections provide examples. Immorality was the charge against the teacher who wrote the critical letter in *Watts v. Seward School Board*[308] and was included among the charges against the principal accused of receiving dual compensation in *Brownsville Area School District v. Alberts*.[309] However, on the basis of recent decisions it seems that the courts are moving toward a more restricted definition of the term, almost equating it with sexual misconduct.

The discussion of "immorality" as a ground for certificate revocation pointed out, too, that when the disciplinary action is for immoral conduct the courts are tending to decide the case on basis of impact rather than some preexisting societal norm. As McGhehey stated it:

> The developments in case law during the last 10 years or so suggest . . . that neither immoral behavior nor criminal convictions may provide the automatic basis for dismissal commonly assumed by school board members and school administrators. Instead, the courts appear to be fashioning a requirement that the public employer show a causal connection, a nexus, between illegal or immoral behavior, and performance on the job.[310]

The *Morrison* and *Erb* cases provide fitting examples of this requirement.[311]

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306. *Id* at 649, 242 N.W. 2d at 485.

307. *See supra* notes 24 and 25. *See also*, M. Willemsen, *Sex and the School Teacher*, 14 SANTA CLARA LAWYER 839-864 (1974).

308. 454 P. 2d 732 (Alas. 1969), *cert. denied*, 398 U.S. 928 (1970).

309. 436 Pa. 429, 260 A.2d 765 (1970).

310. M. McGhehey, *Illegal or Immoral Behavior and Performance in the Classroom. The Necessary Nexus*, NEW DIRECTIONS IN SCHOOL LAW 162 (1976).

311. Morrison v. State Bd. of Educ., 1 Cal. 3d 218, 461 P. 2d at 378; Erb v. Iowa State Bd. of Pub. Instr., 216 N.W. 2d 339 (Iowa 1974).

The teacher's private life is generally protected from employer interference unless an adverse impact on the school can be shown. The Eighth Circuit Court affirmed the district court's holding for the teacher in a Nebraska case.[312] The board had dismissed the teacher for immorality because she permitted young men, most of whom were friends of her 26-year-old son, to spend nights in her one-bedroom apartment. While recognizing the board's right to inquire into the teacher's associations, the court ruled that such inquiries did not provide sufficient evidence of misconduct to justify infringement of the teacher's rights.[313]

An Illinois teacher, married one month and eight and one-half months pregnant, was dismissed for immorality. The appellate court affirmed the trial court ruling that this charge is a cause for dismissal only when it can be shown that the teacher's conduct produces harm to the pupils, faculty, or the school.[314] Similarly, a federal district court struck down the rule of a Mississippi board barring the employment of unwed parents.[315]

However, a Massachusetts teacher's rather bizarre behavior led to his dismissal. On numerous occasions he was seen moving about his property, dressing and undressing what was thought to be a dress mannequin (the object was actually a camera tripod wrapped with a pillow and covered with a dress). His actions were described as lewd or suggestive. For the most part, this conduct occurred while his wife was away in the evening attending night classes. The court refused to order the teacher's reinstatement.[316]

Private homosexual behavior has received judicial protection, as previously noted, from the penalty of certificate revocation.[317] There is also a growing body of case laws dealing with the dismissal of homosexuals. The courts have suggested tests or standards that appear to be the same for dismissal as for certificate revocation, that is, showing a reasonable relationship between the alleged misconduct and the individual's fitness to teach or between this conduct and material disruption of the educational program.

In one of the earlier cases, *McConnell v. Anderson*,[318] the federal district court, in ordering the University of Minnesota to honor the contract of an admitted homosexual librarian, said:

> The plaintiff's position will not expose him to children of tender years who could conceivably be influenced or persuaded to his penchant.

312. Fisher v. Snyder, 476 F.2d 375 (8th Cir 1973) *See also* Schreiber v. Joint School Dist No. 1, 335 F. Supp. 745 (D Wisc. 1972) for a similar ruling.

313. *But see supra* note 189

314. Reinhardt v. Board of Educ. of Alton Commun. School Dist., 10 Ill. App. 3d 481, 311 N.E 2d 710 (1974). *But see* Brown v Bathke, 416 F Supp. 1194 (D Neb.1976) in which a federal district court upheld the dismissal of an unmarried pregnant junior high school teacher.

315. Andrews v Drew Mun Separate School Dist., 371 F Supp. 29 (N.D. Miss. 1973).

316. Wishart v. McDonald, 367 F Supp 530 (D. Mass. 1973)

317 *See* Morrison v State Bd of Educ., 1 Cal. 3d 239, 461 P.2d 394

318. 316 F. Supp 809 (D C Minn 1970)

> What he does in his private life as in other employees' should not be his employer's concern unless it can be shown to affect in some degree his efficiency in the performance of his duties. . . .[319]

However, the Eighth Circuit Court reversed because of the employee's activist role in advocating his chosen life-style and the adverse publicity that resulted.[320]

This same rationale appears in similar cases at the elementary and secondary school level. In Maryland a federal district court held that the board's removal of a homosexual teacher from his teaching duties was arbitrary and unjustified. But the teacher's activities, such as radio and television appearances, tended to spark controversy and produce a deleterious effect on the educational program. The refusal of the board to reinstate or renew his contract was therefore justified. On appeal, the Fourth Circuit Court held that even the public comments regarding his homosexuality had First Amendment protection [321] The court affirmed the district court decision, however, because the teacher failed to reveal information concerning his membership in a homosexual club in response to questions on his application.

The Washington Supreme Court held that the burden of proof was on the school district to show that knowledge of a teacher's homosexuality would impair the learning atmosphere of the classroom.[322] The trial court had based its decision upholding the dismissal solely on the testimony of the school's administrative staff. The teacher had contended that his effectiveness would not be altered. The supreme court remanded the case for further proceedings.

The Ninth Circuit Court considered a case resulting from the dismissal of a nontenured teacher for immorality after she admitted being a "practicing homosexual."[323] The teacher's admission came after the principal confronted her with information supplied by a student's parent The district court awarded damages equivalent to the teacher's salary for the balance of the year and one-half salary for the following year but refused to order reinstatement. In affirming, the Ninth Circuit said: ". . . although the parties have stipulated that Ms. Burton was an 'adequate teacher' we cannot say that her chances of reemployment were such as to warrant our finding the same type of 'property interest' in reemployment which might require reinstatement of a tenured teacher. "[324]

Board of Education v. Calderon[325] is a case in which the teacher challeng-

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319. *Id.* at 814
320 451 F.2d 193 (8th Cir 1971), *cert denied*, 405 U S. 1046 (1972)
321. Acanfora v Board of Educ of Montgomery Cty , 491 F 2d 489 (4th Cir 1974)
322. Gaylord v. Tacoma School Dist. No 10, 85 Wash. 2d 348, 535 P 2d 804 (1975)
323 Burton v Cascade School Dist , 512 F 2d 850 (9th Cir. 1975).
324 *Id.* at 854
325 35 Cal App. 3d 490, 110 Cal Rptr 916 (1973), *rehearing denied*, January 31, 1974

ed his dismissal for a sex offense on the ground that the court acquitted him of the charge. The police arrested the teacher on the city college campus and charged him with the sex offense of oral copulation. Ten months later he was acquitted, but the board fired him. The trial court in reviewing the dismissal found that the teacher did engage in oral copulation as the board charged. The court further noted that "a judgment of acquittal does not establish that the acts constituting the offense were not committed by the defendant." The appellate court affirmed the decision, pointing out that the board could legally act independently of the criminal court's action. "[T]he criminal charge between the defendant and the state was penal in nature," said the court, "while the case between the defendant and the Board is remedial, for the protection of young children."[326]

This quotation appropriately leads into the next grouping of cases illustrating dismissals for immorality. The facts of each case include sexual involvement of a teacher with a student or students. The courts have almost without exception upheld the boards' action against such teachers.

In Illinois a band director lost his position because of immoral conduct.[327] The specific misbehaviors involved are described in the following testimony of a female student enrolled in one of his classes.

> . . She was in the plaintiff's band class and when he taught he made her sit between his legs and put his arms around her and put his hands on her chest She further testified that he touched her with the palms of his hands six or seven times She thought he had done it accidentally and found when she tried to push his hands away he replaced them She further testified . . that he put his elbow in her lap and his hand on her chest The plaintiff kissed her on the cheek and would stick his tongue in her ear and kissed her on the cheek and on the face a lot.[328]

The same type of conduct was described in the testimony of other students. The court concluded that the evidence sufficiently justified the board's action.

Eight years later, a Colorado teacher was dismissed for immorality after engaging in somewhat similar conduct According to the record, during a field trip the teacher was riding in the rear seat of a van being driven by one of the adult chaperones. He engaged in activities that he characterized as "good-natured horse play" and that consisted of "touching and tickling the girls on various parts of their bodies and occasionally between the legs in proximity to the genital areas " There was reciprocal conduct on the part of the girls The language use was occasionally vulgar and contained many sex-

326. *Id* at 496, 110 Cal Rptr at 921

327 Lombardo v Board of Educ of School Dist No 27, 100 Ill App 2d 56, 241 N E 2d 495 (1968)

328 *Id*, 241 N E 2d at 495

ual innuendos. Later on during the trip, in violation of the "lights out" rule, the teacher spent some time alone in the van with a female student discussing her personal problems. On another occasion he was seen in a motel room lying on the bed with a female student watching television.[329]

The state supreme court rejected the teacher's arguments that "immorality" as a ground for dismissal was unconstitutionally vauge and that his actions could not serve as a basis for dismissal unless the board established that they had an advere effect on his ability to teach. On this latter point, the court said, "In our view, whenever a male teacher engages in sexually provocative or exploitive conduct with his minor female students a strong presumption of unfitness arises against the teacher."[330]

Other cases have developed from an illicit relationship between a teacher and his student. An immorality charge resulted from an incident in which a deputy sheriff on routine patrol discovered a junior college teacher in a parked car with one of his female students. Both the student and the teacher were partly nude when the deputy flashed his light into the car. The teacher cursed, accelerated the car in reverse, knocked the deputy to the ground, and attempted to elude the officer in a high-speed chase. The court concluded that "the conduct of a teacher, even at the college level, excludes meretricious relationships with his students, as well as physical and verbal assaults on duly constituted authorities in the presence of his students."[331] The California courts upheld the dismissal.

The circumstances surrounding the discharge of an Illinois teacher were similar.[332] The board of education included the following statement as a part of the charges.

> [You were found] with a female student enrolled in Peoria High School, who was less than 18 years of age, and that at said time and place both you and this student were either naked or partially undressed, that you were observed by an officer and that foregoing facts have become known to public by reason of the filing of a police report.[333]

The dismissal hearing was not illegally conducted, as charged by the teacher. After the board had heard six character witnesses for the teacher, it was justified in refusing to hear eleven more.

The fact that the student had graduated did not affect the outcome of a dismissal action against a tenured counselor who allegedly spent the night in

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329. Weissman v. Board of Educ. of Jefferson Cty. School Dist., 547 P.2d 1267, 1270 (Colo. 1976).

330. *Id.* at 1274.

331. Board of Trustees v. Stubblefield, 16 Cal. App. 3d 820, 822, 94 Cal. Rptr. 318, 321 (1971).

332. Yang v. Special Charter School Dist. No. 150, 11 Ill. App. 3d 239, 296 N.E.2d 74 (1973).

333. *Id.* at 240, 296 N.E.2d at 75.

bed with her.[334] The act took place in the girl's home while her parents were away. Maintaining that his conduct did not affect his performance as a counselor, the plaintiff claimed the action against him was an invasion of privacy. The appellate court disagreed. The court noted the strict standard of conduct expected of teacher-counselors and that the community would justifiably assume the affair began while the girl was his counselee.

Even when the teacher-student relationship has parental blessing, the teacher still may be discharged for immorality.[335] Denton, a junior high school teacher, became acquainted with a female high school student. He obtained her parents' permission for them to date. They dated during the summer and fall when she became pregnant. They were married shortly thereafter. The state appellate court affirmed the dismissal.

In the final two cases, criminal proceedings were in progress when the boards acted to discipline the teachers. *Moore v. Knowles*[336] began when, because of allegations of some eighth-grade girls, a teacher was charged with among other things statutory rape. The teacher was never tried on these charges. The board suspended the teacher, and his contract was not renewed. After the long series of litigation, it was decided that the teacher had no "property" interest in the position and therefore was not entitled to a hearing. In the other case, a dismissed elementary school principal petitioned for reinstatement.[337] The board had dismissed the principal after he had been charged with contributing to the delinquency of a minor (by causing the minor to place his hands on the principal's penis) and indecent exposure. The board attempted to serve charges on the principal, but he willfully disregarded the letter sent by certified mail to his address. In so doing, he waived his right to a hearing by not requesting it within thirty days. The court held also that the school board was not required to await the outcome of the criminal proceedings before it dismissed the teacher.

Cruelty

The statutes of a number of states list "cruelty" as a ground for dismissal. Through the years very few teachers have been discharged for this cause. It is rather surprising, then, that in 1975 and 1976 the courts considered three cases in which teachers challenged dismissals for cruelty.

In Washington State a music teacher lost his job for physically abusing students. The board documented two incidents; in the first the teacher push-

334. Goldin v. Board of Educ., 45 App. Div. 2d 870, 357 N.Y.S.2d 867 (1974).

335. Denton v. South Kitsap School Dist. No. 402, 10 Wash. App. 69, 516 P.2d 1080 (1973); 512 F.2d 12 (5th Cir. 1975). *See supra* note 310 for a discussion of the history of this

337. Hankala v. Governing Bd. of Roseland School Dist., 46 Cal. App. 3d 644, 120 Cal. Rptr. 827 (1975). The firing of a Florida teacher was upheld in an administrative proceeding because of an incident in which he tried to hypnotize a sixteen-year old girl, while she smoked marijuana in his bedroom, in an effort to break her drug habit. *See* The Wichita Eagle, 12A January 7, 1977.

ed a student, and in the second he struck a student with a substantial blow. The trial court denied the teacher's request for a jury trial and found that the second act sufficiently supported the board's charge.

The appellate court reversed and remanded the case for the jury trial requested by the plaintiff.[338] Stressing the importance of the decision, the court said:

> The impact of this decison, particularly where discharge occurs as opposed to nonrenewal for financial reasons, may seriously impair a teacher's possibility in gaining new employment in his profession.[339]

The court rejected the board's argument that lay people on the jury were not qualified to decide on the matter and pointed out that they were also lay people.

Although a Pennsylvania teacher alleged that the board terminated his contract because of the antiadministration statements he had made, the court found that the evidence indicated otherwise.[340] The record revealed that:

> Appellant subjected children under his control to physical abuse of striking them on the head, wrestling them to the ground, propelling them into walls and against furniture, shaking them and subjecting them to a humiliating form of horseplay referred to locally as "red belly," consisting of exposing the victim's abdomen and rubbing or slapping it in order to produce what the appellate apparently believed was an interesting florid appearance . . . [and] subjected students to cruel and humiliating verbal abuse.[341]

Citing the definition of cruelty from Blacks',[342] the court concluded that the teacher's actions constituted the type of misconduct anticipated by the legislature. In upholding the dismissal, the court also found sufficient evidence to support the charge of persistent and willful violation of school laws.

The final case, also in Pennsylvania, was brought by a teacher with sixteen years' service in the district.[343] The cruelty charge followed a single incident in the teacher's sixth-grade classroom. The problem began near the end of the school day when the teacher called one of the pupils to the front and told him to be quiet and work on his lesson. After the boy had returned to his seat the teacher heard the remark, "The elephant is angry." Since the plaintiff was a large, heavy-set man weighing 230 pounds, he assumed that the reference was directed at him. Believing that the same boy made the remark,

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338. Lines v. Yakima Pub. Schools, 12 Wash App 939, 533 P 2d 140 (1975)
339. *Id.* at 944, 533 P 2d at 143
340. Caffas v. Board of School Directors of Upper Dauphine Area School Dist., ___ Pa Cmwlth ___, 353 A.2d 898 (1976)
341. *Id.* at ___, 353 A.2d at 900
342. BLACK'S LAW DICTIONARY at 541
343. Landi v. West Chester Area School Dist., ___ Pa. Cmwlth. ___, 353 A 2d 895 (1976).

the teacher called him back to the front, grabbed him by the shoulders, shook him, and pushed him into the blackboard, causing him to hit his head. After the boy had fallen to the floor, the teacher grabbed him by the hair and arm, stood him up, then pushed him into a bookcase. Again the boy struck his head and fell to the floor. The teacher then shouted, "He is crying like a baby," and kept the boy after class. The student did ride home on the school bus. When the bus arrived at his house, another student helped him inside. As he was dizzy and nauseous, had pain in his head, and was vomiting, his parents took him to the hospital. Although the doctor found no apparent injuries, the soreness and pain continued two weeks.[344]

The secretary of education sustained the board's dismissal of the teacher. The commonwealth court held that the evidence was sufficient to support the action, affirmed the decision, and dismissed the appeal.

Illegal Strikes

The use of "striking illegally" as a ground for teacher dismissal is an obvious byproduct of the collective bargaining movement in public education. In one important respect, this type of action differs from those previously discussed in that a group of teachers rather than an individual teacher is involved. It was established early that an employer could not terminate or refuse to renew a teacher's contract solely because of union activity.[345] But a majority of states either expressly or impliedly forbid teacher strikes. The courts are now setting the parameters of school board authority to discharge striking teachers and defining the individual rights of teachers in such situations.

A 1973 New York decision dealt with the procedural rights of teachers violating the state's antistrike law.[346] The law provides that those found guilty are to be placed on probation and are to be treated as probationers under the state's civil service law. The court ruled that such teachers could not be removed from their positions without notice and hearing.

Two years later in Michigan, the state supreme court held that illegally striking employees could be dismissed under the Public Employees Relations Act without a prior hearing.[347] The dispute began in August 1973, and teachers did not report for work in September 1974. Classes resumed in October in compliance with injunctive orders. Again, the teachers failed to report for work in December. The board adopted a resolution requiring

344 *Id.* at ___, 353 A.2d at 354.

345 *See* McLaughlin v. Tilendis and Lee v. Smith, *infra* notes 353 and 355.

346 Tuller v. Central School Dist. No. 1, 73 Misc. 2d 1028, 343 ___ S.2d 467 (Sup. Ct. 1973). *See also* Sheffer v. Board of Educ. of Gibraltar School Dist. No. 1, 45 Mich. App. 190, 206 N.W.2d 250 (1973).

347 Rockwell v. Board of Educ. of School Dist. of Crestwood, 393 Mich. 616, 227 N.W.2d 736 (1975).

teachers to either report for work or submit their resignations; failure to comply would result in dismissal. One hundred eighty-four teachers were terminated. The court concluded that the state's Teacher Tenure Act did not govern in the case of labor disputes.[348]

Finally, the United States Supreme Court reversed a decision of the Wisconsin Supreme Court that held that the due process clause of the Fourteenth Amendment "required that the teachers' conduct and the Board's response be evaluated by an impartial decision maker other than the Board."[349] The Court acknowledged that it was bound to accept the highest state court's interpretation of the statute, which was that the law "prohibited the strike and that termination of the striking teachers' employment was within the Board's statutory authority."[350]

The facts were somewhat similar to the Michigan case just cited. The teachers organization and the board were unable to reach agreement on a new master contract. School began, and the teachers resumed their duties while negotiations continued. In March the union went on strike in violation of state law. After most of the teachers ignored invitations to return to work, the board decided to hold a disciplinary hearing for each teacher still on strike.

In reversing the decision, the Supreme Court said:

> The Board's decision whether to dismiss striking teachers involves broad considerations, and does not in the main turn on the Board's view of the "seriousness" of the teachers' conduct or the factors they urge mitigated their violation of state law. It is not an adjudicative decision, for the board had an obligation to make a decision based on its own answer to an important question of policy: what choice among the alternative responses to the teachers' strike will best serve the interests of the school system, the interests of the parents and children who depend on the system, and the interests of the citizens whose taxes support it. *The Board's decision was only incidentally a disciplinary decision:* it had significant governmental and public policy dimension as well.[351]

The Court went on to say that permitting the board to make the decision "leaves the balance of power in labor decisions where the state legislature struck it" and "assures that the decision whether to dismiss the teachers will be made by the body responsible for that decision under state law."[352]

Other Causes

Although "cause" is a statutory ground for contract nonrenewal, it is used

348 *See also* Lake Michigan College Fed'n of Teachers v Lake Michigan College, 518 F 2d 1091 (6th Cir 1975)

349 Hortonville Joint School Dist No 1 v Hortonville Educ Ass'n, 96 S Ct 2308 (1976)

350. *Id.* at 2312

351. *Id.* at 2315

352 *Id.* at 2316

here as a miscellaneous category. Long ago the courts said that a board of education may not penalize a teacher for any cause the board deems sufficient. As noted in the previous sections, teachers may not be dismissed solely for the exercise of their constitutionally protected rights. In most of the cases that follow, the courts were faced with the problem of deciding whether the exercise of a constitutional right was the actual reason for the discharge and whether the employee had a protected interest in continued employment.

In *McLaughlin v Tilendis*, an early action brought under § 1983, the courts said that probationary teachers may not be dismissed or denied a contract solely because of union membership or activities.[353] In the words of the opinion:

> Public school teachers have the right of free association . . . unless there is some alleged illegal intent, an individual's right to form and join a union is protected by the First Amendment.[354]

Even more recently, in *Lee v. Smith*, a federal district court reiterated the principle that "[a] teacher may not be denied a teaching contract because of his activities in a professional association, regardless of how vigorous they are."[355]

On the other hand, the Pennsylvania Commonwealth Court ruled that the section of the public school code enumerating the causes for termination of an employee's contract precluded dismissal for other reasons.[356] Specifically, a teacher could not be dismissed for failure to maintain union membership.

Other decisions have overturned teacher dismissals as unconstitutionally discriminatory on the basis of sex. A first-year teacher, discharged at the end of her sixth month of pregnancy, claimed that the board's action violated her constitutional rights. The federal district court agreed, but the Tenth Circuit Court[357] remanded the case for rehearing. A Pennsylvania court invalidated the dismissal of a teacher who refused to resign at the end of her fifth month of pregnancy as a violation of the state's Human Rights Act.[358]

A South Carolina school board was able to defend its nonrenewal of a teacher's contract on the basis of the disruptive effects of his marital problems.[359] The teacher contended that he was released because of his association with black people, his religion, and his place of birth. The plaintiff, a

353. 398 F.2d 287 (7th Cir. 1968).
354. *Id* at 288-289.
355. As quoted in 6 NOLPE NOTES 4 (March 1971). *See also* Shumate v Board of Educ of Cty. of Jackson, 478 F 2d 233 (4th Cir 1973), Chitwood v Feaster, 468 F 2d 359 (4th Cir 1972).
356. Dauphin Cty Tech School Educ Ass'n v Dauphin Cty Area Voc-Tech School Bd, ___ Pa. Cmwlth ___, 357 A 2d 721 (1976).
357. Buckley v Coyle School Sys, 476 F 2d 92 (10th Cir. 1973).
358. Cerra v East Stroudsburg Area School Dist, 450 Pa 207, 299 A.2d 277 (1973), *rev'g*, 3 Pa Cmwlth. 665, 285 A 2d 206.
359. Meicia v Berry, 406 F Supp 1181 (D S.C. 1974).

Roman Catholic, born and reared in New York City, came to Dillon, South Carolina, after he had married a local girl He began teaching there in 1969. The marriage was fraught with problems, including separations and violent behavior primarily on the part of the wife According to testimony, during her pregnancy in 1970-71 she broke windows, smashed the TV set on three occasions, and threatened the plaintiff with a bottle and a knife The specific examples of interference with his job performance were an absence of one week when he took the child to his parents in New York and an incident in which the wife came to school and threatened the plaintiff in front of his class.

The federal district court concluded that the teacher lacked a "property" interest in the renewal of his contract "sufficient to bring his claim within the gambit of the Fourteenth Amendment's procedural due process protection." The court continued: "[I]t should be equally clear that the same reasoning applies to a substantive claim . . " The plaintiff had contended that the board's action was not based on sufficient evidence [360]

There are still comparatively uncomplicated dismissal cases An Alabama teacher's contract was cancelled for, among other things, being in school while under the influence of intoxicants [361] The principal and or superintendent had warned the teacher on six separate occasions The decision of the state tenure commission and the lower courts that the dismissal was procedurally sound and supported by the evidence was affirmed by the Alabama Supreme Court Even when procedural errors are made, a Washington appellate court ruled that the board could correct them [362] The board failed to follow the prescribed steps in dismissing a teacher for excessive drinking The correction was made by beginning a new action, giving proper notice of probable cause and the opportunity for a hearing

V. SUSPENSION, TRANSFER, AND DEMOTION

The teacher conduct and or the reasons given for suspending and transferring teachers and other professional employees roughly paralled those cited for dismissal This fact is not surprising since suspension quite often is the preliminary step in a dismissal action. It should be noted, too, that a transfer may or may not represent a demotion and that in many instances it is nondisciplinary—merely a result of staff reductions or the inability of the employee to carry out the duties of the position For the most part, the cases considered here deal with suspension and transfer as penalties that the board assesses or that the court substitutes for a more severe penalty

360 *Id* at 1195
361 Autry v Board of Educ , 285 Ala 617, 235 So.2d 651 (1970)
362 Hunter v Board of Directors, 13 Wash App 682, 536 P 2d 1209 (1975)

Incompetency

A school counselor, transferred to a teaching position, maintained that the action represented a demotion and was therefore invalid without a hearing. The principal had rated the counselor's performance as "poor," and the Littleton Education Association had dismissed the counselor's grievance as being without merit. The Colorado Appellate Court rejected the plaintiff's petition.[363]

In another transfer action a dean of students was transferred to a teaching position.[364] The employee requested and received a statement of reasons that included loss of confidence in his judgment, disagreement on administrative procedure, failure to keep his superiors informed, and divisive conduct. In upholding the transfer the California court said.

> But a second or third level administrator bears to his superiors a relationship of the most intimate nature, requiring complete trust by the top administrators in the judgment and cooperative nature of the subordinate. The loss of that trust is not a matter susceptible of proof such as is involved in the cases where a classroom teacher is dismissed or demoted for objective acts of misconduct. To introduce into the administrative structure the elements of discharge for "cause" and formal hearing would be to make effective school administration impossible. The statutes do not require that.[365]

A Colorado case resulted from the transfer of a principal to a teaching position because of numerous "complaints from teachers and parents concerning discipline in the school."[366] The court held that the state statutes gave him no right to notice and hearing. Similarly, in another case the Sixth Circuit affirmed the district court's ruling that the tranfer of a principal was not a punitive demotion requiring a statement of charges or opportunity for a hearing.[367]

Insubordination

The highest state court in New York upheld the suspension of a teacher for insubordination.[368] The school principal saw the teacher out walking during a day that he was absent from school on sick leave. Since the teacher looked to be in good health, the principal telephoned him to come to the office for a conference. During the conversation the teacher asked "if he should bring a note from his doctor or his mother." The teacher attended the conference,

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363 Frank v. Arapahoe Cty. School Dist., 506 P 2d 373 (Colo. App. 1973)

364 Hentschke v. Sink, 34 Cal. App. 3d 19, 109 Cal. Rptr. 549 (1973)

365 *Id.* at 22-23, 109 Cal. Rptr. at 551

366 Wheeler v. School Dist. No. 20, 535 P 2d 206 (Colo. 1975). *See also* Commonwealth, Dept. of Educ. v. Kauffman, 21 Pa. Cmwlth. 89, 343 A 2d 391 (1975)

367 Coe v. Bogart, 519 F 2d 10 (6th Cir. 1975)

368 Peterkin v. Board of Educ. of Union Free School Dist. No. 5, 46 App. Div. 2d 676, 360 N.Y.S. 2d 53 (Sup. Ct. 1974)

and, when asked for an explanation, he told the district superintendent to speak to his lawyer, then walked out, slamming the door. The doctor provided a detailed description of the plaintiff's illness as well as the illnesses of the family members. The court pointed out that the district superintendent's investigation was appropriate and his request for an explanation was lawful and warranted a direct response

A West Virginia teacher successfully challenged his suspension for insubordination and neglect of duty after he had missed the first day of school to register for an evening class at the university.[369] The court observed that the teacher had made several attempts to notify the school administrators and that the pupils had not suffered since classes were not in session. A dissenting judge objected to the court's substituting its judgment for that of the board.

The courts have overturned other suspensions and transfers when the employees were able to establish that the board's action violated their constitutional or statutory rights. For example, in *Goetz v. Norristown Area School District*[370] a Pennsylvania court ordered the board to pay the teacher for the time she was off work. The court ruled that the board had illegally suspended the teacher after she refused to resign after her fifth month of pregnancy as required by board regulation. Also, the California Supreme Court ordered a teacher restored to his former position after he had been transferred for criticizing the school's policies on dress and outside speakers and the administration's refusal to permit the publication of a second school newspaper.[371]

Political Activity

Seven professional employees brought action against a superintendent and a board of education in Kentucky charging that they had been transferred and demoted because of their political activity in a school board election.[372] They supported candidates the superintendent opposed. After the election he recommended the transfers, and the board approved them "for betterment of the schools." The plaintiffs were not given a specific statement of reasons.

The opinion described the situation thusly:

> Superintendent Cassady held the hand that played the game—the teachers were poor pawns to be transferred or demoted at his pleasure. All he had to do was to recommend the transfers and demotions. Like puppets, four members voted to assist Cassady in his vendetta against teachers and employees.[373]

The court granted the relief sought.

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369 Beverlin v. Board of Lewis Cty., ___ W. Va. ___, S.W. 2d 554 (1975).
370 16 Pa. Cmwlth. 389, 328 A. 2d 579 (1974).
371 Adcock v. Board of Educ., 109 Cal. Rptr. 676, 513 P. 2d 900 (1973).
372 Calhoun v. Cassady, 534 S.W. 2d 808 (Ky. 1976).
373. *Id.* at 808.

Unprofessional Conduct and Unfitness

A federal district court in Massachusetts upheld the suspension of a junior high school music teacher for unprofessional conduct.[374] The suspension came after a series of incidents, each followed by a warning from the administration. These transgressions included the use of offensive language in the classroom, tearing a boy's shirt as he was punishing him, and striking a boy with a belt. The school board suspended the teacher for ten days, then reduced the time to seven days as stipulated by state law.

In Maine a teacher/principal was relieved of administrative duties. The "official" reason specified by the board was that the position was abolished; however, the board minutes revealed that a director had charged that the employee was "unfit." No attempt was made to substantiate this latter charge. The court concluded that the board's statement was subterfuge, since another individual was employed to perform the duties formerly covered by the plaintiff. The court ruled that the board had breached the employment contract, which did not expire for another year.[375]

Cruelty

The New York courts recently considered cases in which teachers contested suspensions for cruelty. In *Hodgkins v. Central School District No. 1 of Conklin*[376] the court stated that the government's interest in protecting students outweighed the teachers' right to a hearing prior to their suspension without pay. The suspension was permissible as long as there was no undue delay in the final determination of disciplinary proceedings.

The same court in another case reduced the penalty assessed against a teacher for alleged abuse of children from dismissal to a three-month suspension without pay.[377] According to the court, the charges that the petitioner failed to adhere to school regulations or obey specific instructions given by superiors regarding the alleged use of physical punishment and keeping children after school were without substance since there was no evidence that such regulations or directives existed.[378] The board did sustain ten counts of incompetency and lack of professionalism for which the penalty was assessed.

Grounds Not Stated

In a number of recent decisions the record did not reveal the specific conduct leading to the suspension or transfer. A Texas school board transferred a

374. Wood v. Goodman, 381 F. Supp 413 (D Mass 1974)
375. Kenaston v School Adm'rs Dist No 40, 317 A 2d 7 (Me 1974)
376 48 App Div 2d 302, 368 N Y S 2d 891 (1975)
377. *In re* Bott v Board of Educ , 51 App Div 81, 379 N.Y S 2d 172 (1975)
378 *Id.* at ____, 379 N Y S 2d at 176

superintendent to a teaching position after only a few months' service. At the employee's request he was given a statement of reasons and a hearing. There was no finding of fact on any of the thirty-nine reasons. The superintendent sought relief through administrative appeal to the commissioner of education, who ruled that the contract between the employee and the board was binding. The board appealed, and the employee cross-filed. The court upheld the ruling and awarded the superintendent $21,000.[379]

The Fourth Circuit Court held that a demoted employee is not required to mitigate damages by accepting inferior employment.[380] In this § 1983 action the former principal was offered employment as an assistant principal elsewhere after the abandonment of the school. In ordering $6,767.36 damages, interest, court cost, and attorney's fees, the court said that the employee's refusal of the position was not unreasonable.

After a superintendent in Washington had suspended a teacher with pay pending investigation of charges of misconduct, the teacher brought action against the district seeking reinstatement and damages.[381] The court found that this did not constitute an action of the board for which the statutes provide appeal to the courts. Because the teacher failed to file a timely appeal after the board did send her notice of probable cause for discharge, she forfeited all rights to further proceedings.

Finally, in another example of penalty reduction by the New York courts, a teacher's dismissal was changed to suspension without pay. Although the court recognized that the teacher's guilt was supported by substantial evidence, it said the "punishment of dismissal was so disproportionate to the offense as to be shocking to one's sense of fairness."[382]

VI. SALARY LOSS, FINES, AND IMPRISONMENT

The penalties of salary loss, fines, and imprisonment are often imposed for group offenses. Employers sometimes withhold salary or deny incremental increases in response to unauthorized absences and illegal strikes. On the other hand, it is the judiciary that imposes fines or prison terms for law violations within the context of public education; such violations include defiance of court injunctions in relation to strikes and picketing or assault and battery of work-connected nature.

Unauthorized Absences

The most common consequence of an unauthorized absence (other than

379. Board of Trustees v. Briggs, 486 S.W. 2d 829 (Tex. Civ. App. 1972).
380. Williams v. Albemarle City Bd. of Educ., 508 F.2d 1242 (4th Cir. 1974).
381. Minielly v. Clarkston School Dist. No. J-250-185, 14 Wash. App. 242, 539 P.2d 690 (1975).
382. *In re* Ebner v. Board of Educ., 51 App. Div. 799, 380 N.Y.S. 2d 257, 258 (1976).

for strikes) is loss of wages for days missed. One basis for challenging the imposition of this penalty is the correctness of the classification of the absence under the statutes or leave policy of the school system. The California Education Code permits the use of sick leave in cases of personal emergency and contains a list of valid emergencies that includes appearing before a court as a litigant. In *Stevens v. Board of Education of San Marino* a teacher sought a court order to compel the school district to pay him for the sick leave days he used in appearing before the Los Angeles County Assessment Appeals Board.[383] The court refused to issue the order on the ground that this was not a "personal emergency" and that the plaintiff could not be termed "in court as a litigant."[384]

Although a board of education in New Jersey adopted a calendar providing for school to be in session on legal holidays, it could not penalize teachers for failure to report for duty on those days. According to a decision of the commissioner of education, withholding one day's pay from each of three teachers who absented themselves on Columbus Day was in violation of state statute, which reads:

> No teacher shall be required to teach school on any holiday declared by law to be a public holiday, and no deductions from a teacher's salary shall be made by reason of the fact that a school day happens to be a day declared by law to be a public holiday. A contract made in violation of this section shall have no force or effect against a teacher.[385]

The dispute between teachers and a school board in Minnesota also centered on a Columbus Day unauthorized absence.[386] In this 1975 case, the state supreme court found that the board acted within its authority to direct teachers to work on that day. Furthermore, with one exception, the court let stand the penalties that the board assessed, that is, all teachers lost their salary for the day missed, the probationary teachers were not reemployed for the following year, and tenured teachers did not receive an annual salary increment. The court disallowed the continuation of the salary freeze for an additional year.

Illegal Strikes

Compulsory collective bargaining in the public sector is a fairly recent phenomenon. According to a report prepared by The Public Service Research Council,[387] the first compulsory public sector bargaining law was

383 9 Cal App. 3d 1017, 88 Cal Rptr 769 (1970)
384 *Id* at 1022, 88 Cal Rptr at 772
385 Moldovan v Board of the Twp of Hamilton, Mercer Cty., Dec of N J Comm'r of Educ., 3 (1971).
386 Skeim v Independent School Dist No 115, 234 N W 2d 806 (Minn 1975)
387 THE PUB SERVICE RESEARCH COUNCIL, *supra* note 89

enacted in 1959, and by 1974 thirty-four states had enacted similar legislation. All but seven of the existing laws prohibit strikes. The most common penalty provided by law is a loss of pay.

Teachers in New York are subject to provisions of the so-called Taylor Law for public employees, which specifies two days' pay deduction for each day missed because of an illegal strike. Striking teachers have often challenged the constitutionality of the law's provision for the salary deduction. In *Lawson v. Board of Education of Vestal* the members of a teachers' association charged that the Taylor Law violates due process of law because of the manner in which the violation is determined.[388] On the other hand, in *Zeluck v. Board of Education of New Rochelle* the challenge was based on the denial of equal protection of the law because the provision distinguishes between private and public employees and the penalty constitutes a bill of attainder.[389] In both cases the challenges were rejected by the courts, and the assessment of the penalty was permitted to stand.

In recent years these types of deductions have also been the subject of litigation in other states. In these cases, the authority of the board of education to make deductions for the time missed for strikes was not questioned. Instead, the teachers charged that the board erred in procedures used in making the deductions. In Rhode Island, teachers who failed to report for work were not paid for six days, including Columbus Day. Because this is a legal school holiday in the state, the court ruled wages for that day should not have been deducted.[390] A group of California teachers also succeeded in obtaining lesser pay deductions. They established to the court's satisfaction that the board of education used an incorrect formula, based on school days rather than calendar days, in calculating the amount their salaries should have been reduced.[391]

Another method used to penalize striking teachers is legislation prohibiting salary increases. The Minnesota "no strike" law requires that the employment of the striking employee be terminated and that, if he or she is reemployed, no salary increases be given for one year. In a negotiated settlement following a strike, a board of education agreed to reemploy teachers who had been on strike and to pay them for the period of the strike.[392] The district court enjoined the payment of these wages as a violation of the statute. The teachers appealed, charging the statute violated their rights

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388 35 App Div 2d 878, 315 N.Y.S 2d 877 (1970)

389. 62 Misc 2d 274, 307 N Y S 2d 329 (Sup Ct 1970)

390. School Comm of City of Pawtucket v State Bd. of Educ., 103 R I 359, 237 A 2d 713 (1968)

391 McNickels v Richmond Unified School Dist., 11 Cal App 3d 1209, 90 Cal Rptr 562 (1970)

392 Read v Special School Dist No 1, 182 N W 2d 887 (Minn 1970)

under the First and Fourteenth Amendments. This claim was rejected by the Minnesota Supreme Court, which observed:

> Public employees have no common law right to strike. It is clearly established common law that a strike by public employees for any purpose is illegal. . . . The Indiana court held that public employees do not have the right to strike and can only acquire it through legislation.[393]

Pennsylvania's "Strike by Public Employees Act" had a similar provision that precluded salary increases for three years after a strike. A taxpayer sued to enjoin the Scranton school board from paying salary increases budgeted for teachers who had allegedly gone on strike.[394] Although the board of education joined the teachers' organization in contending that the courts lacked jurisdiction, their complaints were dismissed. Subsequently, the legislature amended the law. As a result, the controversy was finally resolved when the state supreme court held that this amendment effectively ratified the board's action in granting the salary increases, though it may have been illegal at the time.[395]

The question of authority to fine became the subject of litigation in Florida.[396] In 1968, as part of the much publicized collective action of the teachers of the state, four hundred teachers in Lee County resigned their positions. An agreement was negotiated that permitted the teachers to pay a one-hundred-dollar fine and to return to their previous status. A class suit brought by the individual teachers, the National Education Association, and the Florida Educational Association challenged these fines. The federal district court held that school boards in Florida do not have the authority to impose fines and that the punishment did not meet the requirement of due process. Further, the court issued an order requiring that the money collected in fines be returned and that those teachers who refused to pay the fines be reinstated. The Fifth Circuit Court reversed the lower court ruling, however. The court noted that persons could not be required to give up constitutional rights in order to secure public employment but that the fine was a legal consideration for restoration of tenure and reemployment rights.[397]

Violations of Court Injunctions

One recourse a board of education has in responding to an illegal strike is to request a court injunction. If the injunction is granted and the teachers defy the judicial order to return to work or to cease picketing, the court can fine or imprison the offender.

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393. *Id.* at 894.
394. Legman v. School Dist of the City of Scranton, 432 Pa 342, 247 A.2d 566 (1968).
395. *See* 438 Pa 157, 363 A 2d 370 (1970)
396. National Educ Ass'n v Lee Cty Bd of Pub. Instr., 299 F Supp 834 (M D. Fla. 1969).
397. National Educ Ass'n v Lee Cty Bd of Pub Instr., 467 F.2d 447 (5th Cir 1972)

Teachers' organizations are not completely precluded from pressuring for better employment conditions. A school district sued to enjoin the National Education Association and the New York State Teachers Association from imposing sanctions on it.[398] The sanctions, termed an "urgent advisory," called on teachers not to make application or to take employment with the district until its labor situation was resolved. Noting that these provisions were not binding and threats were not made against the membership for failure to comply, the court refused to order the injunction.

Peaceful picketing may not be permitted if it is used to promote an illegal strike. In North Dakota three teachers were convicted of criminal contempt for violating an order enjoining picketing, work stoppages, or strikes.[399] The sheriff and his deputies testified they observed the three defendants walking back and forth carrying signs at the entrance to the Minot Air Force Base, the Minot High School, and the board of education building, respectively. The teachers appealed, asserting, among other things, that the contempt statute was unconstitutional because it encroached on constitutional guarantees of freedom of speech and assembly and because it permitted trial without a jury. These contentions were rejected by the state supreme court. The teachers were fined two hundred fifty dollars plus court costs of fifteen dollars. Sentences of thirty days in jail were suspended on condition of good behavior, including no further unlawful picketing.

Teachers of Kankakee, Illinois, similarly challenged a temporary restraining order prohibiting them from striking and picketing.[400] Their claims of First and Fourteenth Amendment violations were also rejected. In the words of the opinion:

> The circuit court had authority and duty to issue without notice a temporary restraining order against the unlawful strike of the teachers already in progress and picketing by them. And the teachers' disobedience of such order merits their punishment for contempt.[401]

Picketing, according to the court, "while a mode of communicating ideas is not dogmatically equated with constitutionally protected free speech."[402]

The Lakeland Federation of Teachers was fined five thousand dollars because the evidence demonstrated that the union instigated a strike and caused strike bulletins and other communications urging support of the strike to be issued to the teachers and parents in the Lakeland district.[403]

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398. Board of Educ. of Union Free School Dist. of Town of Brookhaven v. National Educ. Ass'n and New York State Teachers Ass'n, 63 Misc. 2d 338, 311 N.Y.S. 2d 370 (Sup. Ct. 1970)
399. State v. Heath, 177 N.W. 2d 751 (N.D. 1970)
400. Board of Educ. of Kankakee School Dist. v. Kankakee Fed'n of Teachers, 46 Ill. 2d 439, 264 N.E. 2d 18 (1970)
401. *Id.* at 446, 264 N.E. 2d at 22.
402. *Id.*
403. Lakeland Fed'n of Teachers v. Board of Educ., 65 Misc. 2d 397, 317 N.Y.S. 2d 902 (Sup. Ct. 1971)

However, charges against the individual teachers were dismissed even though evidence indicated that certain teachers were absent from work and were seen in a picket line in front of the schools. The court decided this evidence was not sufficient to establish that they willfully engaged in a strike in violation of the restraining order.

The New Jersey courts have imposed both fines and prison sentences on teachers' organizations, their officers, and their members for striking in violation of restraining orders. Following an illegal strike, the Woodbridge Township Federation of Teachers was fined one thousand dollars, and its officers and members of the negotiating committee were given fines of five hundred to one thousand dollars, prison terms of one to three months, and probationary periods of one to two years.[404] The court emphasized the seriousness of the offense:

> When government undertakes itself to meet a need, it necessarily decides the public interest requires the service, and its employees cannot reverse or frustrate that decision by a concerted refusal to meet that need. In any event, teachers are ill-situated to profit from the distinction we have rejected, since the maintenance of a free public school system is mandated by the State Constitution itself.[405]

In another New Jersey case, the court ruled that a ten-thousand-dollar fine against the Jersey City Education Association was not excessive.[406] Judge Carton observed:

> Unlike union officers, the union itself cannot be jailed for contempt. On the other hand, the citation of all striking members individually and the invocation of plenary proceedings as to each present an impractical alternative method of vindicating the public wrong committed by willful defiance of the order. We observe also that the fine of $500 or $1,000 maximum fine even on a daily basis, would not, in all probability, serve as a deterrent to a large union calling a strike of public employees.[407]

Also, the United States Supreme Court refused to hear the contempt case of the Newark Teachers Union. In addition to fines and jail sentences for rank-and-file members, the union itself received a forty-thousand-dollar fine.[408]

A federal district court in Pennsylvania upheld the imprisonment of two union officials pending appeal of their conviction for criminal contempt.[409] The court had sentenced them to terms of six months to four years.

In another Pennsylvania case the teacher union challenged the issuance of an injunction against its strike and the conviction of its officers for con-

404. *In re* Block, 50 N.J. 494, 236 A.2d 580 (1967).
405. *Id.* at 499, 236 A.2d at 592.
406. *In re* Jersey City Educ. Ass'n, 115 N.J. Super. 42, 278 A.2d 206 (1971).
407. *Id.* at 57, 278 A.2d at 214.
408. Board of Educ. v. Newark Teachers Union, 114 N.J. Super. 306 (1972).
409. United States *ex. rel.* Sullivan v Aytch, 355 F. Supp. 630 (E.D. Pa. 1973)

tempt.[410] Strikes by public employees in that state are legal and may be enjoined only when there is a clear and present danger or threat to the health, safety, or welfare of the public involved. The Commonwealth Court held for the union because the board had petitioned for the injunction before the strike began and the trial court had erroneously assumed jurisdiction.

No such restriction exists in the statutes of Hawaii, and the lower court issued a preliminary injunction against a proposed strike by the Hawaiian State Teachers Association. The court threatened fines of one hundred thousand dollars plus ten thousand dollars per day for each day the strike continued. The state supreme court, after the strike occurred, affirmed the lower court ruling but reduced the fine from a total of one hundred ninety thousand dollars to one hundred thousand dollars.[411]

Two recent decisions focused on the courts' authority to exceed statutory limits in fining teachers' unions violating injunctive orders. The Washington Supreme Court permitted the lower court to exceed the limit, accepting its contention that the limit rendered its powers of enforcement ineffectual.[412] The Wisconsin Supreme Court held that there was no justification for the lower court's exceeding that state's limit. The case came after 750 of Kenosha's 1,150 teachers went on strike and the board was forced to close the schools.[413] The trial court fined the teachers ten dollars per day for each day they were out and the union seventy-five hundred dollars per day. The supreme court reduced this latter figure to the statutory limit of three thousand dollars.

In 1976 the Wisconsin Supreme Court considered an appeal from a lower court order holding 213 public school teachers guilty of civil contempt for violating a temporary injunction restraining a strike.[414] The following factors represented the basis for the court's decision: (1) the city board of education was a proper party to bring suit; (2) the injury the injunction sought to prevent had occurred—the strike was in progress and the schools were closed; (3) there was an adequate show of irreparable harm; (4) the teachers were aware of the order. The supreme court indicated that the teachers were not entitled to a jury trial and sustained the imposition of the fine of ten dollars per day.

Assault and Battery

By definition, assault is "intentional unlawful offer of corporal injury to

410 Commonwealth v Ryan, 459 Pa 148, 326 A 2d 351 (1974)

411 Hawaiian State Teachers Ass'n v Hawaii Pub Employment Relations Bd, 520 P 2d 422 (Hawaii 1976).

412 Mead School Dist v Mead Educ Ass'n, 534 P 2d 561 (Wash 1975)

413. Kenosha Unified School Dist No 1 v Kenosha Educ Ass'n, 234 N W 2d 311 (Wis. 1976).

414. Joint School Dist No 1 v Wisconsin Rapids Educ Ass'n 234 N W 2d 289 (Wis. 1976)

another by force, or force unlawfully directed toward the person of another," and battery is "any unlawful beating or other wrongful physical violence inflicted without his consent."[415] It is assumed that work-connected assault and battery can justifiably be considerd a part of teacher discipline.

Although few assault and battery cases involving teachers have moved beyond the trial courts in the past five years, those that have illustrate the types of teacher conduct involved. Typically the complainant is a pupil who, after being physically punished, files charges against the teacher. Unless denied by statute or school board regulation, the teacher has the common-law right to administer reasonable corporal punishment. Therefore, the court must examine the specific actions of the teacher to determine whether they exceed the bounds of reasonableness.

In Arizona a seventh-grade pupil sued his teacher for assault and battery, alleging that, during a softball game, the teacher grabbed him by the throat and slammed him against the backstop.[416] The teacher, acting as the umpire, had called the pupil out in a close play at first base. The teacher contended he had shoved and admonished the boy for using coarse language. The court noted that reasonable corporal punishment does not give rise to cause for action to attain damages. Although the testimony was conflicting, the Arizona Appellate Court affirmed the trial court's judgment for the teacher.

Governmental immunity does not free the teacher from liability for wrongdoing. The Kentucky Court of Appeals ruled that a trial court erred in granting a summary judgment for a teacher on the ground that he could not be held liable if he was acting within the scope of his authority.[417] Retrial was ordered on the facts, that is, to establish whether the teacher inflicted any corporal punishment or physical restraint on the pupil, a junior high school girl, and, if so, whether it was in excess of what appeared reasonably appropriate under the circumstances.

Under what conditions do the courts consider corporal punishment unreasonable? In its decision in one case, the Illinois Appellate Court said, "[T]he teacher may not wantonly or maliciously inflict corporal punishment, and may be guilty of battery if he does so."[418] The facts of this case centered around an incident at a high school football game. The teacher was assigned the duty of keeping the crowd away from a fence between the stands and the playing field. Shortly before half-time a player was injured, carried from the field on a stretcher, and placed near the fence. At half-time, the plaintiff, a fifteen-year-old boy, went to the fence to learn the ex-

415. BLACK'S LAW DICTIONARY at 147 and 193

416. La Frentz v. Gallager, 105 Ariz App 176, 462 P.2d 804 (1969) *See also* Hogenson v. Williams, 542 S.W.2d 456 (Tex. Civ. App. 1976) in which the appellate court ordered a new trial to determine whether a junior high school football coach was guilty of assault in physically reprimanding one of his players in a team practice

417. Carr v. Wright, 423 S W 2d 521 (Ky 1968)

418. City of McComb v Gould, 104 Ill App 2d 361, 244 N.E 2d 361 (1969)

tent of the player's injury. The teacher ordered the crowd back. As the boy started to leave, the teacher allegedly turned him around and struck him several times on the face before a campus policeman intervened. The court upheld the teacher's conviction for violating a city ordinance prohibiting fighting and assessed him a ten-dollar fine.

In a 1973 Oregon case, a student sought to recover damages against a teacher who he claimed shoved him into a door with glass windows.[419] The incident began when the student refused to complete an assignment that consisted of viewing a film and writing a report. After warning the student several times to be quiet, the teacher asked him to leave the room. The student (who is described in the record as aged fourteen, a low achiever, behind in class, truant on occasion, involved in fighting, and lax in completing assignments) ignored the teacher's request and responded with vulgar language. The teacher headed for the desk, and the student stood up. As the teacher attempted to remove the student from the room, the boy pulled his arm free, swung at the teacher, and his arm crashed into the glass.

The court held for the teacher, indicating that reasonable force can be used in removing a student from the classroom. His actions violated neither the student's constitutional rights nor the state code.

While there was no specific charge of assault and battery, a parent did sue teachers and administrators in an Illinois school district for intentionally abusing, attacking, embarrassing, and intimidating her children. The amended claim cited damages to the children's nervous systems and their learning abilities. The court rejected the parent's claim, indicating that the defendants were acting within their realm of authority.[420]

In another 1974 Illinois case, student newspaper reporters filed an assault and battery complaint against the teachers who ejected them from a faculty senate meeting.[421] The court noted that the teachers were acting in their official capacity as people authorized by the senate, an agency of the institution and the state; therefore, the state was the real party against which the students should have sought relief. The court dismissed the complaint for lack of jurisdiction, which that state vests in a court of claims.

A fitting summary for this section is provided by the findings of a study by Schlaegel and Fordyce.[422] This study, based on a survey of the judicial reports of the several jurisdictions, was made to ascertain the extent to which

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419. Simms v. School Dist. No. 1, Multnomah Cty., 13 Ore App 119, 507 P.2d 23[illegible] (1973).

420. Gordon v. Oak Park School Dist. No. 97, 24 Ill. App 3d 131, 320 N.E.2d 38[illegible] (1974)

421. People *ex rel.* Maculba v Cheston, 25 Ill App. 3d 224, 223 N.E 2d 40 (1974)

422. Schlaegel & Fordyce, *Schools—Corporal Punishment without Civil or Criminal Liability*, 72 W.Va Law Rev 339 (1970) *See* Baker v Owen, 96 S. Ct 210 (1975), a memorandum decision of the Court, and Ingraham v Wright, 525 F 2d 909 (5th Cir 1976) (*en banc*) *cert. granted*, 96 S. Ct. 2200 (1976) In this latter case, the parents asked compensatory and punitive damages, maintaining that the school's use of corporal punishment violated their children's constitutional rights. On April 19, 1977, the Court, by a 5-4 decision, upheld the circuit court's ruling and rejected the parents' claim

public school teachers may physically discipline students without incurring criminal or civil liability. In general, the decisions reveal judicial agreement that a teacher may administer only reasonable corporal punishment. On the other hand, the courts were divided on the degree of physical discipline that constitutes reasonable punishment. In this regard, the study contains these specific findings:

> North Carolina, Ohio, Alabama, Illinois and Pennsylvania have adopted the proposition . . . that a teacher is immune from criminal liability in administering corporal punishment provided that it is not inflicted with legal malice or does not produce permanent injury or disfigurement. Similarly, Ohio, Illinois and Alabama have adopted the view that a teacher is not civilly liable for inflicting excessive physical force in good faith from motives of duty, unless such punishment results in permanent injury.
>
> The great majority of jurisdictions, however, hold a teacher to be both civilly and penally liable for the administration of excessive corporal punishment regardless of whether such punishment is inflicted from good motives or results in no serious injury.[423]

Under this latter position, the sex, age, size, and apparent physical condition of the pupil are key factors in determining whether the teacher himself is to be disciplined.

Other Offenses

A teacher's conduct in protesting administrative decisions can conflict with city ordinances. After being denied permission to hang a mural in the high school, a teacher stood up during an assembly program and said, "I'm leaving the building and won't return until the mural is hung."[424] He then left, accompanied by students, the number of which was disputed. Charges were later filed on the basis of a city ordinance that provided.

> Any person who by noisy or disorderly conduct disturbs or interferes with the quiet or good order of any place of assembly, public or private, including schools, churches, libraries, and reading rooms, is a disorderly person.[425]

The teacher was found guilty as charged and sentenced to the county jail for three months. This sentence was suspended, and the teacher was placed on probation for one year.

The teacher was also convicted of trespass. Two days after the board of education suspended him following the assembly incident, the teacher conducted a "vigil of protest" in the school parking lot, against the board's action. The school principal ordered him to leave, after which both the disorderly conduct and the trespass charges were filed. The New Jersey

423. *Id.* at 400
424. State v. Besson, 110 N J Super 528, 226 A.2d 175 (1970)
425. *Id* at 532, 226 A 2d at 177

Superior Court affirmed the conviction for disorderly conduct but reversed that for trespass, holding that peaceful protest is a protected right of the individual.[426]

Finally, in a 1976 New York case the court found that the evidence against a teacher supported the charges of conduct unbecoming a teacher, neglect of duty, and inefficiency.[427] In a practice not unusual for that state, the court reduced the penalty, holding "that the punishment of dismissal was so disproportionate to the offense . . . as to be shocking to one's sense of fairness." The court changed that penalty to a fine of four thousand dollars

VII. CONCLUDING COMMENTS

In the closing section of the monograph, *The Courts and Student Conduct*, Reutter warned of "simplistic conclusions" in education law and chose to let the record speak for itself.[428] Because of mass litigation on teacher discipline and the issues yet to be resolved, this course of action would appear to be a prudent way to conclude this work as well. However, the author does feel obligated to cite from the record some of the major developments of the past five years and to present a few general observations concerning possible trends

Legislation

State legislatures, in increasing numbers, have adopted public sector collective bargaining laws[429] and established professional practices commissions and/or licensure boards.[430] These laws have a direct effect on the reasons for disciplinary action and how such discipline is administered. For example, in one state "cause" for dismissal is a negotiable item,[431] and in a number of states the professional practices commission has the authority to revoke teaching certificates.[432] In disputes arising from the discipline of teachers, the record reveals a more frequent use of grievance procedures,[433] hearing panels,[434] and arbitration,[435] all of which are products of recent legislation.

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426 *Id* at 527, 228 A 2d at 181

427 Bowman v Board of Educ of Lawrence Union Free Dist No 15, 51 App Div 2d 544, 378 N Y S 2d 420 (1976).

428 E REUTTER, THE COURTS AND STUDENT CONDUCT (1975)

429 *See supra* notes 1 and 89

430 *See supra* notes 123,

431 MAINE LEGISLATIVE SERVICE 1975 at 151 M R S A 20 § 161

432 ALASKA STAT § 14 20-030 (1975). ORE LAWS of 1973 amending 342 865

433 *See e g* Frank v Arapahoe Cty School Dist , 506 P 2d 373 (Colo App. 1973)

434 *See e g* Clayton v Board of Educ , 49 App Div 2d 343, 375 N Y S 2d 169 (1975)

435 *See e.g* Ferndale Educ Ass'n v School Dist for City of Ferndale, 67 Mich App 645, 242 N W 2d 481 (1976)

Court Decisions

What seems to be the prevailing attitude of the courts toward teacher discipline is expressed in excerpts from two recent opinions:

> The power of the board of education to dismiss and discipline teachers is not merely punitive in nature and is not intended to permit the exercise of personal moral judgments by board members; rather it exists and finds its justification *in the state's legitimate interest in protecting the school community from harm*, and its exercise can only be justified upon showing that such harm has occurred or is likely to occur.[436] (Emphasis added)

> We emphasize the board's [State Board of Public Instruction] power to revoke teaching certificates is neither punitive nor intended to permit exercise of personal moral judgment by members of the board. Punishment is left to the criminal law, and the personal moral views of board members cannot be relevant.[437]

Yet, questions remain: What constitutes "harm or threat of harm to the school community"? Who or what agency is to determine that harm or a threat of harm exists?

So many of the teacher discipline cases considered in preceding sections turned on the results of the courts' "balancing test." But, what is the proper balance between the state's interest in operating the schools and in protecting the school community from harm, on one hand, and the teachers' civil and constitutional rights and their aspirations, on the other? The Supreme Court's most recent decisions on public employees suggest a possible shifting of that balance toward state or societal interests.[438]

As the record clearly indicates, the courts are reviewing more and more personnel decisons involving the disciplining of teachers. This litigation, when combined with that produced by other aspects of the educational operation, represents a tremendous cost in terms of time and money for school systems. But this review process is a part of a much larger problem, aptly described as follows:

> So long as modern life grows ever more complex, demands on the law will increase. That much is inevitable. And if Americans want to prevent their system of government from being changed in a fundamental manner, *they will have to find ways in which to prevent every buck from being passed to a judge and every problem from being turned over to a lawyer.* The U.S. has created the most sophisticated—and the fairest—legal process in the world. But the burdens are becoming intolerable.[439] (Emphasis added)

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436. Weissman v. Board of Educ. of Jefferson Cty. School Dist., 547 P 2d 1267, 1270 (Colo. 1976).

437. Erb v. Iowa State Bd. of Pub. Instr., 216 N.W.2d 339, 345 (Iowa 1974).

438. McCarthy v. Philadelphia Civil Serv. Comm'n, 96 S. Ct. 1154 (1976). Kelly v. Johnson, 96 S. Ct. 1442. Bishop v. Wood, 96 S. Ct. 2074 (1976). Hortonville Joint School Dist. No. I v. Hortonville Educ. Ass'n, 96 S. Ct. 2316 (1976).

439. J. Footlick, *Too Much Law?* NEWSWEEK, January 10, 1977 at 47.

The quotation from *Bishop v. Wood* that "[t]he federal court is not the appropriate forum in which to review the multitude of personnel decisons that are made daily by public agencies" seems to speak to this problem.[440] Hopefully, the future will see more of the conflicts concerning teacher conduct fairly and justly resolved short of the courts.

440. 96 S Ct. 2074, 2080 (1976)